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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 324.

WILLIAM J. BUTTFIELD, PLAINTIFF IN ERROR,

vs.

NEVADA W. STRANAHAN, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 26, 1930.

(18,946.)

20498

(18,945.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 294.

WILLIAM J. BUTTFIELD, PLAINTIFF IN ERROR,

vs.

NEVADA N. STRANAHAN, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 28, 1903.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between William J. Buttfield, plaintiff, and Nevada N. Stranahan, collector of the port of New York, defendant a manifest error hath happened, to the great damage of the said William J. Buttfield as is said and appears by his complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 15th day of June 1903, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of May, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-seventh.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

ALFRED C. COXE,
U. S. Judge.

2 [Endorsed:] E & A C 2042 Supreme Court of the United States. William J. Buttfield plaintiff in error, *vs.* Nevada N. Stranahan collector of the port of New York defendant in error. Writ of error. James L. Bishop attorney for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this — day of ——, 189–. —— ——, attorney for defendant in error. A copy of the within paper has been this day received at this office May 20 1903 Henry L. Burnett, U. S. attorney. S. 1.45 p'd

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to 53 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of William J. Buttfield plaintiff in error, against Nevada N. Stranahan, collector of the port of New York defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-second day of May in the year of our Lord, one thousand nine hundred and three and of the Independence of the United States the one hundred and twenty-seventh.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 New York Supreme Court, County of New York.

WILLIAM J. BUTTFIELD, Plaintiff,
against
NEVADA N. STRANAHAN, Collector of the Port of New York, Defendant. } Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judg-

ment will be taken against you by default for the relief demanded in the complaint.

Dated New York, December 4th, 1902.

JAMES L. BISHOP,
Plaintiff's Attorney.

Post office address and office, No. 135 Broadway, borough of Manhattan, New York city.

(Endorsed:) New York supreme court, county of New York.—William J. Buttfield, plaintiff, against Nevada N. Stranahan, collector of the port of New York, defendant Summons.—James L. Bishop, plaintiff's attorney, 135 Broadway, New York city.—Served Dec. 4, 1902, custom house, New York.—Custom house, N. Y. Collector's office, law division. Service of a copy of the within is admitted this 4th day of Dec. 1902. N. N. Stranahan, collector.—Received Dec. 8, 1902, U. S. attorney's office.

4 Supreme Court of the State of New York, County of New York.

WILLIAM J. BUTTFIELD, Plaintiff,
against
NEVADA N. STRANAHAN, Collector of the Port of New York, Defendant.

William J. Buttfield, the above named plaintiff, complains of Nevada N. Stranahan, the above named defendant, and respectfully shows:

First. At the times hereinafter mentioned, the plaintiff was the owner of eight (8) packages of teas, imported by the steamer "Adana," and marked

No. 2 and stored at the Roberts stores of the New York Dock Company, in the borough of Brooklyn, city of New York.

Second. On or about the 7th day of November, 1902, the plaintiff duly tendered to the defendant, who was then and is now the collector of customs at the port of New York, the duties payable under the laws of the United States upon the said teas, and then and there demanded the said teas from the defendant, and the defendant refused to deliver the same to the plaintiff or to permit him to remove the same from said stores, or to receive the said duties, or any duties on said teas.

Third. On or about the 16th day of November, 1902 the defendant wrongfully seized the said teas and removed and destroyed the same.

5 *Fourth.* The said teas were of the value of one hundred and twelve 00/100 dollars.

Fifth. By reason of the said wrongful acts aforesaid the plaintiff has been damaged in the sum of one hundred and fifty ($150) dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of one hundred and fifty ($150) dollars damages, with interest and costs.

JAMES L. BISHOP,
Attorney for Plaintiff.

Office & P. O. address, 135 Broadway, borough of Manhattan, New York city.

COUNTY OF NEW YORK, *ss:*

William J. Buttfield, being duly sworn deposes and says: That he is the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except — to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM J. BUTTFIELD.

Sworn to before me this 24th day of December, 1902.
LUTHER G. BILLINGS, JR.,
Commissioner of Deeds, New York City.

(Endorsed:) New York supreme court.—William J. Buttfield, plaintiff, against Neveda N. Stranahan, collector of the port of New York, defendant.—Complaint.—James L. Bishop, attorney for plaintiff, No. 135 Broadway, New York city.—Received, Dec. 24, 1902, U. S. attorney's office.

6 (121.)

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

To the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit:

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } *ss:*

Nevada N. Stranahan, petitioner and affiant, respectfully showeth that he was, prior to the commencement of the suit hereinafter referred to, collector of the customs for the port and district of the city of New York, duly appointed according to law, and that on or about

the 4th day of December, 1902, a suit was commenced against him by William J. Buttfield, in the supreme court of the county of New York, for or on account of acts done by him under the revenue laws of the United States, and as such collector, and that he has been served with process in said suit in said southern district, and that no trial has been had in said cause.

He therefore prays that in pursuance of the act of Congress, in such case made and provided, the said cause so commenced in the said supreme court may be removed therefrom and entered on the docket of this honorable court, and thereafter proceeded in as a cause originally commenced in this court.

And he will ever pray, etc.

And being duly sworn, deposes and says, that the matters hereinbefore set forth are true to the best of his knowledge, information and belief.

NEVADA N. STRANAHAN.

Sworn to before me this 31st day of December, A. D. 1902.

[SEAL.] L. J. MAHER,
Notary Public, County, N. Y.

I certify that, as counsel for the petitioner, I have examined into the proceedings against him, and have carefully inquired into all the matters set forth in the within petition and affidavit, and that I believe the same to be true.

New York, January 2nd, 1903.

HENRY L. BURNETT,
U. S. Attorney, Counsellor of the said Circuit Court.

(Endorsed:) U. S. circuit court.—William J. Buttfield, plaintiff, *vs.* Nevada N. Stranahan, collector of customs at the port of New York.—Petition to remove cause.—Henry L. Burnett, United States attorney, attorney for defendant.—U. S. circuit court, southern district of New York, Filed Jan. 2, 1903, John A. Shields, clerk.

7 Form No. 672.

The President of the United States of America to the judges of the supreme court of the county of New York, Greeting:

[L. S.] We, for certain reasons, being desirous that our circuit court of the United States, for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against Nevada N. Stranahan defendant by William J. Buttfield plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 6th day of January 1903, as fully and amply as the same are remaining before you, by whatever names the said parties may be

called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 2nd day of January in the year one thousand nine hundred and three.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

HENRY L. BURNETT, *United States Attorney,*
Attorney for Defendant.

(Endorsed:) U. S. circuit court.—William J. Buttfield *vs.* Nevada N. Stranahan.—Certiorari.—Henry L. Burnett, United States attorney, attorney for defendant.—I hereby certify, that on the 2nd day of January, 1903, at the city of New York, in my district, I
8 served the within certiorari upon the within named the judges of the supreme court of the county of New York by exhibiting to Harry Burrell as deputy county clerk for New York county the within original, and at the same time leaving with him a copy thereof. Wm. Henkel, United States marshal, southern district of New York. Dated January 6th, 1903.—U. S. circuit court, southern district of New York, Filed Jan. 2, 1903, John A. Shields, clerk.

9 Circuit Court of the United States, Southern District of New York.

WILLIAM J. BUTTFIELD, Plaintiff,
vs.
NEVADA N. STRANAHAN, Collector of the Port of New York, Defendant.

The above named defendant by his attorney, Henry L. Burnett, United States attorney, for the southern district of New York, answering the complaint of the plaintiffs herein, alleges:—

First. He admits that at the time and times set forth in said complaint the defendant was and now is collector of customs at the port of New York.

Second. Defendant further answering, denies each and every allegation in said complaint contained, except as herein expressly admitted.

Wherefore defendant asks judgment that the complaint of the plaintiff herein be dismissed with costs.

HENRY L. BURNETT,
United States Attorney, Attorney for Defendant.

Office & P. O. address, room 50, P. O. building, New York city.

(Endorsed:) U. S. circuit court, southern district of New York.—William J. Buttfield, plaintiff, *vs.* Nevada N. Stranahan, collector of the port of New York, defendant.—Answer.—Henry L. Burnett, United States attorney, attorney for def't. U. S. circuit court, southern district of New York, Filed Feb. 28, 1903, John A. Shields, clerk.

10 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court rooms in the borough of Manhattan, in the city of New York, on Monday the thirteenth day of April in the year of our Lord one thousand nine hundred and three.

Present: The Honorable Alfred C. Coxe, circuit judge.

WILLIAM J. BUTTFIELD
vs.
NEVADA N. STRANAHAN, Collector of the Port of New York.

Now comes the plaintiff by James L. Bishop, Esq., his attorney and moves the trial of this cause. Likewise comes the defendant by E. B. Whitney, Esq., his attorney. Thereupon a jury is impaneled and the cause proceeds to trial. After hearing the evidence for the respective parties and the argument of counsel the court directs a verdict for the defendant.

An extract from the minutes.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

11 United States Circuit Court, Southern District of New York.

WILLIAM J. BUTTFIELD, Plaintiff,
vs.
NEVADA N. STRANAHAN, Collector of the Port of New York, Defendant.

The above entitled action having come on for trial on a regular call of the calendar of said court at a session thereof held by Hon. Alfred C. Coxe, circuit judge and a jury on the 13th day of April, 1903, in the United States court and post office building, in the city of New York, and said court having directed a verdict in favor of the defendant, and having ordered that judgment should be entered in said action in favor of the defendant against the plaintiff, with costs of said action, and said costs having been adjusted at the sum of twenty-three 20/100 dollars ($23.20)

Now on motion of Henry L. Burnett, United States attorney, for the defendant (Edward B. Whitney of counsel) it is

Ordered, adjudged and decreed that the defendant Nevada N. Stranahan have judgment against the said plaintiff, upon the issues

in said action dismissing the complaint upon its merits with costs, and that he recover the sum of twenty-three 20/100 dollars costs, and that defendant have execution therefor.

12 Judgment signed and entered this 15th day of May, 1903.

JOHN A. SHIELDS, *Clerk.*

Assented to as to form.

JAMES L. BISHOP,
Att'y for Plaintiff.

(Endorsed:) U. S. circuit court, southern district of New York.—Wm. J. Buttfield, plaintiff, *vs.* Nevada N. Stranahan, collector, &c., defendant.—Judgment.—Henry L. Burnett, United States attorney, attorney for defendant.—U. S. circuit court, southern district of New York, Filed May 15, 1903, John A. Shields, clerk.

EVENING POST JOB PRINTING HOUSE, NEW YORK.

United States Circuit Court,

SOUTHERN DISTRICT OF NEW YORK.

WILLIAM J. BUTTFIELD,
Plaintiff,

AGAINST

NEVADA N. STRANAHAN, Collector of the Port of New York,
Defendant.

Bill of Exceptions.

Be it remembered that at the Stated Term of the Circuit Court of the United States for the Southern District of New York, held at the Borough of Manhattan, City of New York, in said District, on the 13th day of April, 1903, the Hon. Alfred C. Coxe, a Judge of said Court, presiding, the above entitled cause coming on to be tried, the following proceedings were had, namely, a jury was duly empaneled and sworn.

APPEARANCES:

JAMES L. BISHOP and JAMES H. SIMPSON for Plaintiff.

HENRY L. BURNETT, for Defendant; EDWARD B. WHITNEY, of Counsel.

The following contains all of the evidence and proceedings on the trial.

The plaintiff, to sustain the issues upon his part, submitted the following stipulation: It is admitted and stipulated between the parties hereto that on the 13th day of November, 1902, the plaintiff duly tendered to the defendant the sum of $47.90, being the amount payable as import duties on the teas which are the subject of this action, and at the same time demanded the said teas from the defendant, and that the defendant declined to accept said duties and to deliver said teas. Thereafter, and before the commencement of this action the defendant ordered that the said teas be taken to the United States public stores for destruction, and that the said teas were thereafter removed by the defendant from the place where they were stored to the United States public stores and were there destroyed by the defendant.

Mr. Whitney: This stipulation was made before I was acquainted with the case. The word "duly" tendered does not mean to involve the concession that on the tender the plaintiff was entitled to the teas.

Mr. Bishop: Only that the duties were tendered in the proper way.

It is further admitted and stipulated for the purposes of this trial that on or about January 21, 1902, the packages of tea described in the first paragraph of the complaint were entered at the Custom House in the City of New York by the plaintiff's firm; that there was no irregularity in the invoice, entry or bonding of said teas; that they were examined on February 7, 1902, by Isaac McGay, Esq., examiner of tea at the port of New York, and were rejected as "inferior to standard in quality." That the plaintiff's firm appealed to the Board of U. S. General Appraisers, who thereafter and on March 10, 1902, certified to the Collector "that the said tea is inferior in quality to the standard prescribed by law," and accordingly overruled the appeal. That the plaintiff's firm was notified of said decision on March 12, 1902, and that said teas were in fact in-

ferior in quality to said standard, provided that by 7
"quality" is meant taste and flavor (the plaintiff not hereby conceding that said law, being the Tea Act of 1897, is constitutional, or that the standard was lawfully fixed by the Secretary of the Treasury).

Plaintiff offers in evidence letter addressed to Hon. Nevada N. Stranahan, Collector of Customs, New York City, dated New York, November 1, 1902, signed W. J. Buttfield.

Marked Exhibit 1 of this date.

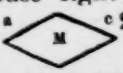
(Copy.)

Plaintiff's Exhibit I. 8

N. Y. Nov. 1st, 1902

HON. NEVADA N. STRANAHAN,
Collector of the Customs,
N. Y. City.

DEAR SIR:—

On January 20th, 1902, we entered for import at the N. Y. Customs House eight packages of tea ex. SS. *Adana* marked a  c 2, and covered by

bond No. 54330 and entry No. 13326.

These teas were reported by the Tea Examiner as inferior in quality to the prescribed Standard fixed and established by the Secretary of the Treasury, 9
under the Act of March 2d, 1897. Upon protest and re-examination, the findings of the Examiner were confirmed March 12th, 1902 by the U. S. General Appraisers. We received due notice of the Examiner's and United States Appraisers' said decisions.

On behalf of the present owner, viz., our Mr. W. J. Buttfield, we have this day applied to the Third Division of the N. Y. Custom House, for a permit to withdraw the said teas for consumption. This application has been refused on the ground that the teas have not been released under the Tea Inspection Act of March 2d, 1897.

On behalf of the present owner we have this day tendered to the Cashier of the N. Y. Custom House in the customary manner, Custom's duty transfer order No. 24238 for the full amount ($47.90) of the import duty levied upon said teas. Acceptance of this payment has been refused by the Cashier of the Custom House on the grounds that a withdrawal permit has not been passed or granted by said Third Division.

On behalf of the present owner, we now beg to tender you said Custom's duty transfer order for $47.90 in full payment of import duties, and request that you will release from the control of the Custom House the teas in question, and permit their withdrawal from Bond for consumption in this Country.

Respectfully,
(Sgd.) W. J BUTTFIELD.

Attached to Exhibit 1 is a transfer order on the Corn Exchange Bank in tender of payment of the duties as follows:

Plaintiff's Exhibit II.

SPECIAL CUSTOMS FUND TRANSFER.

CLEARING HOUSE No. 45.

No. 24,238 $47.90

THE CORN EXCHANGE BANK.

NEW YORK, Nov. 1, 1902.

The Collector of Customs, Port of New York, will charge and transfer to the account of "Duties Paid" Forty-seven & 90 Dollars from the amount deposited by The Corn Exchange Bank with the Assistant Treasurer of the United States at New

York, N. Y., to the account of the "Special Customs Fund." 13

THOS NASH,
Teller.

HAYNES,
Assistant Teller.

Plaintiff offers in evidence a letter dated November 6, 1902, addressed to W. J. Buttfield from the defendant.

Marked Exhibit 3 of this date.

Plaintiff's Exhibit III.

NEW YORK, Nov. 6th, 1902. 14

Mr. W. J. BUTTFIELD,
92 Wall Street,
New York City.

SIR:

I have received your letter dated November 1st enclosing duty transfer order for $47.90 and asking for the release of certain eight packages of tea ex S. S. *Adana* marked A M C No. 2, covered by Bond No. 54,330 and entry No. 13,326.

In reply I have to say that the Regulations of the United States Treasury Department, Article 753 *et seq.* provide for the orderly withdrawal of merchandise from bond upon the payment to the Cashier of Customs of the duties upon presentation 15
to him of the proper withdrawal and permit. Your tender of the transfer order referred to is therefore declined, and the same has been returned to you.

Respectfully,

(Sgd.) N. N. STRANAHAN,
Collector.

Also a letter dated November 7, 1902, from the plaintiff to the defendant.

Marked Exhibit 4 of this date.

14

16 **Plaintiff's Exhibit IV.**

NEW YORK, Nov. 7th, 1902.

Hon. NEVADA N. STRANAHAN,
Collector of Customs at the Port of N. Y.,
N. Y. City.

SIR:

We are in receipt of your letter dated Nov. 6th, relative to certain eight packages of tea, ex SS. *Adana*, marked A C No. 2, mentioned in our communication of the 1st inst.

We understand that you decline our tender of the transfer order in payment of duties, on the grounds that a proper withdrawal and permit has not been
17 presented to the Cashier of Customs in accordance with the Regulations of the United States Treasury Department, Article 753 *et seq.*

We now enclose the required withdrawal made out in duplicate as provided for in said Regulations, and we have to request on behalf of the present owner of the tea, that you will compare, enter and pass this withdrawal now presented at your office.

We have also to request that you will issue a withdrawal delivery permit for said eight packages of tea.

Said withdrawal made out in duplicate was presented on the 1st inst. at the New York Custom House, and refused by the Third Division, on the
18 ground that the tea in question had been rejected under the Act of March 2d, 1897. (See notation on face of withdrawal.)

Respectfully.
(Sgd.) W. J. BUTTFIELD.

(Enclosure.)

Also a letter from the defendant to the plaintiff, dated November 7, 1902.

Marked Exhibit 5 of this date.

Plaintiff's Exhibit V. 19

CUSTOM SERVICE.

OFFICE OF THE COLLECTOR,

New York, N. Y.

NOV. 7TH, 1902.

MR. W. J. BUTTFIELD,
92 Wall St.,
New York.

SIR:

In reply to your request of the 7th inst. for permission to withdraw for consumption certain eight packages of tea, covered by a withdrawal which you enclose, I have to say that this office declines to accept said withdrawal as not being in accordance with the requirements of Art. 1308, Regulations of 1899. 20

Respectfully yours,

(Sgd.) N. N. STRANAHAN,
Collector.

Also a letter from the plaintiff to the defendant, dated November 8, 1902. 21

Marked Exhibit 6 of this date.

22 **Plaintiff's Exhibit VI.**

NEW YORK, Nov. 8th, 1902.

Hon. NEVADA N. STRANAHAN,
Collector of the Customs at the Port of
New York,
N. Y. City.

DEAR SIR:

We are in receipt of your favor of the 7th inst., declining permission to withdraw for consumption certain eight packages of tea, on the ground that such withdrawal for consumption is not in accord-
23 ance with requirements of Article 1308, Regulations of 1899.

We presume that reference is made to Article 1308, appearing in the Regulations of the United States Treasury Department, now in force, viz: "No teas found on final examination to be unlaw-"ful importations under this Act (Act of March 2d, "1897) shall be released from bond, except for the "purpose of immediate transportation, or for de-"struction as the case may be."

We have this day presented at the Third Division of the N. Y. Custom House an entry for exportation for said eight packages of tea, ex SS. *Adana*,
24 marked

, No. 2, which entry for exportation has been refused on the ground that the tea in question was finally rejected under the Act of March 2d, 1897, more than six months previous to the present date. (See notation on face of entry.)

On behalf of the present owner, we now enclose said entry for exportation, made out as provided for in the Regulations of the United States Treasury Department, and we have to request that you will pass this entry for export now presented at your

office, and that you will issue an export withdrawal permit for said eight packages of tea.

Respectfully,

(Sgd.) W. J. BUTTFIELD.

Also a letter from the defendant to the plaintiff dated November 11, 1902.

Marked Exhibit 7 of this date.

Plaintiff's Exhibit VII.

NEW YORK, Nov. 11th, 1902.

Mr. W. J. BUTTFIELD,
Nos. 92/96 Wall St.,
New York.

SIR:

I have received your letter of the 8th inst. relative to your application to have released from bond for exportation certain eight packages rejected tea, ex S. S. *Adana*.

In reply I have to say that no such application can be considered, as the six months fixed by the Act of March 2, 1897, within which exportation is allowable, has already expired, and the tea in question will be ordered to the U. S. Public Stores for destruction.

Your export papers are herewith returned.

Respectfully yours,

(Sgd.) N. N. STRANAHAN,
Collector.

(Enclosures).

28 WILLIAM J. BUTTFIELD, called for the plaintiff, being duly sworn, testified as follows:

EXAMINED BY MR. BISHOP:

I am the plaintiff in this action, and am an importer of tea, and have been engaged in that business for fifteen years. I am an expert in teas. I was the owner of the eight packages of tea in controversy in the present suit, and was such owner in October and November, 1902, up to the time of their destruction. I purchased the teas from my firm, composed of Mr. C. W. McCutchen, special partner, and myself as general partner. The teas were stored at the time they were taken by the Collector
29 in a warehouse of the New York Dock Company, Brooklyn. I am familiar with the correspondence which has just been offered in evidence in this case. Through my firm we made an application at the Custom House for withdrawal of the teas for consumption, tendering the amount of duties levied upon the same. This was refused. That application was made in the usual and ordinary form in which applications for withdrawal of teas are made. Subsequently we made an application in the usual form at the Custom House for exporting teas. We also made an application to the Collector personally in writing to be permitted to withdraw the tea for consumption and to withdraw the teas
30 for export from this country.

I am a citizen of the United States, and was at the time of these occurrences. I am familiar with the different grades and qualities of teas. The teas in question were classified as country green teas. I am a citizen of New Jersey.

I have prepared a schedule giving the different qualities of green teas—country green teas—arranged in order and numbered from 1 to 17, Number 1 being the highest grade and Number 17 the lowest grade. This paper which I produce is such compilation.

Marked Exhibit 8 of this date.

Exhibit No. 8.

SCHEDULE OF COUNTRY GREEN TEAS ARRANGED IN ORDER OF QUALITY.

1 Choicest Moyune					
2 Choice Moyune	Choicest Teenkai				
3 Finest Moyune	Choice Teenkai				
4 Fine to Finest Moyune	Finest Teenkai				
5 Fine Moyune	Fine to Finest Teenkai				
6 On Fine Moyune	Fine Teenkai				
7 Fully Good Medium Moyune	On Fine Teenkai				
8 Good Medium Moyune	Fully Good Medium Teenkai	Finest Fychow			
9 On Good Medium Moyune	Good Medium Teenkai	Fine "			
10 Fair Moyune	On Good Teenkai	Good Medium Fychow	Finest Wenchow		
11 Good Common Moyune	Fair Teenkai	Fair "	Fine "		
12 Common Moyune	Good Common Moyune	Good Common "	Good Med. "		Good, clean, genuine Shanghai packed.
13	Common Teenkai	Common	Fair "		
14			Good Common		
15			Common "		
16					
17					Mixed, Shanghai packed.
					Common, refined and adulterated Shanghai packed.

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34 I am acquainted with the Government standard No. 7 for country green teas established by the Secretary of the Treasury in the regulations of March 21, 1902. That regulation was in force at the time of the rejection of these teas. The quality of the Government standard country green teas Number 7 relatively to the grading upon Exhibit 8 was a finest Teenkai, corresponding to Number 4 on schedule, Exhibit 8. The standard No. 7 would exclude all teas below No. 6, as shown upon Exhibit 8. The country green tea, standard 1901, Number 7, would correspond to Number 4 on the schedule. It would exclude all from 6 down.

"Q. Why not 5? A. The probabilities are that a
35 tea of the following season's import would correspond in quality with that of one grade higher of the previous season. In other words, there is one grade in quality difference."

"Q. There might be that shading down in the course of a year? A. Yes."

The quality of the eight packages of teas mentioned in the complaint was an On fine Teenkai, corresponding with grade Number 7, as shown on Exhibit 8. It corresponds with the grade on Exhibit 8, which is marked 7. That is called On fine Teenkai. The grade of the tea, as judged by style or appearance, was a first Gunpowder. By Gun powder tea, I mean—there are about ten grades
36 of tea in each invoice of country green teas, this was the second from the top—in style and appearance. The quality refers to its cup quality, its taste and flavor, the style refers to its appearance. In style and appearance this was the second grade of tea, and in cup quality—taste and flavor—it was the seventh on this schedule. I examined these teas myself and made a test of them. These teas are absolutely pure, and they are entirely genuine, there was no adulteration. There was nothing whatever about these teas that indicated in any way that they were unwholesome or unfit for consumption. The average quality of

country green tea is higher than that of other kinds 37
of tea imported into this country. At the present time the market value of country green teas ranges from 13 cents up to 40 cents. At the time of the destruction of these teas the range of prices was from 12 to 30 cents. The value of these teas at that time was 22 cents.

CROSS-EXAMINATION BY MR. WHITNEY:

The Government standard was finest Teenkai.

"Q. What makes you think so? A. Expert knowledge."

I found out by testing it. I tested it in the usual 38
way, pouring hot water on the tea, tasting and smelling it. I poured hot water on the tea, tasted the infusion and smelled the liquor. That is called the cup test, and is the ordinary way of finding out the quality of tea. It has always been so since I knew anything about the trade. I used the same test to ascertain what in my opinion was the quality of the tea that I had brought into the country. The tea would generally deteriorate in the course of a year on an average about one grade. It is not apt to deteriorate about four grades. The tea that I brought in would, in my opinion, deteriorate about one grade in the course of a year, so that if it was On fine Teenkai when I brought it in 39
it would be, in my opinion, a year afterwards, about fully good medium Teenkai.

"Q. It is necessary for the Government to select a standard next year that will be a little higher than the importations which are the lowest the Government is willing to admit the next year, isn't it? A. I don't know what it is necessary for the Government to o.

"Q. I mean in selecting the standard the Government must allow for the deterioration during the year? A. I cannot answer that question."

40 HENRY C. THORN, called for the plaintiff, being duly sworn, testified as follows:

EXAMINED BY MR. BISHOP:

I reside at 185 Lafayette avenue, Brooklyn, and am a tea broker. I have been in that business 23 years, and am an expert in teas, and know the different varieties and qualities of teas; I know the standard number 7 for country green teas in the year 1901. Plaintiff's Exhibit 8 of that date shown to me is a schedule of the different qualities of country green teas arranged in their order from the highest to the lowest. The highest grade of tea in quality shown by that exhibit is Choicest Moyune,
41 and the lowest is the Common Country Clean Shanghai packed. I make the grade of the standard for country green teas number 7 for that year, as compared with this schedule the Finest Teenkai, which is grade number 4 here. The standard will not exclude from importation all teas below grade number 4 as shown on Exhibit 8, I don't think it would exclude grade number 5. It would exclude all below grade 5. From my knowledge of the qualities of country green teas every grade from number 4 to number 15 on this list here I think they are every one of them perfectly fit for consumption. I am entirely familiar with them.

Mr. Whitney: Of course by not putting in objec-
42 tions to this we do not waive the objection that the Secretary of the Treasury is the proper judge of what tea is of good quality and fitness for consumption.

The Court: Of course.

I have tested the teas in question in this case, the eight packages. I made the grade of these teas in quality as compared with this schedule number 8 On fine Teenkai. That is grade 7 on this schedule. I think that if the Government standard number 7 had been enforced, all classes of teas from 6 down to 14 would be excluded. It would have excluded

all Fychow and Wenchow teas. There are Fychow 43
and Wenchow green teas which have been ordinary subjects of commerce in this country and which are pure, wholesome and suitable for consumption. Ever since I have been in business they have been articles of commerce in this country. Properly enforced they would all be excluded by this standard. As to the teas in controversy in this case I did not find them in any degree impure. They were genuine tea leaves, free from adulteration, and there was nothing whatever about their grade or quality which rendered them unfit for consumption. The tea was slightly inferior in flavor to the standard. That was the only difference. It was a higher grade of tea than the standard, the standard was a 44
Hyson and this was a first gunpowder. I didn't see any spurious or exhausted leaf among this tea. It would not be possible to say that these teas were in any sense of low quality or grade of teas.

CROSS-EXAMINATION BY MR. WHITNEY:

I don't know whether I ever saw the tea before about ten days ago or not; whether I saw it year or so ago or not. I saw it and examined it carefully about ten days ago. I made my examination about ten days ago; it was made in the usual manner, by drawing it, smelling and tasting it. I mean by pouring the boiling water on the dry leaf, and after 45
it draws out smell and taste it. That is what is called the cup test, and as far as I know it is the test that has always been known to the tea trade. I didn't make any chemical or microscopical tests. I think the standard tea, Government standard of 1901, was a Hyson. My recollection is that it was a Hyson. I have not looked at it in a good many months. In each importation each lot or chop of tea of a given grade there would be a variety of grades, but not necessarily of quality. I call the difference between Hyson and gunpowder the difference in grade or appearance of the leaf which

46 gives its commercial value. The difference between finest Teenkai and finest Fychow is the difference in the cup quality. I call it a difference in the quality of the tea in the cup. You might get a very fancy drawing Hyson or very common drawing gunpowder, and yet the common drawing gunpowder would bring a great deal more money.

"Q. That is in a given chop, whether finest Teenkai or On fine Teenkai or any other, there would be a portion, say, of the grade of the gunpowder that would be worth three times as much as the Hyson? A. Entirely on the style, not on the cup."

"Q. That would be a usual variation to have the gunpowder worth three times as much as the Hy-
47 son? A. Yes, in an ordinary chop of tea it might be."

"Q. The Hyson in a grade 6 for instance would naturally be expected to be about as good as a gunpowder in grade 9 or 10 wouldn't it? A. No, you couldn't make an On Fine Moyune——" [Interrupted.]

I think that a Hyson of an On Fine Moyune would be better than a gunpowder of number 9 or 10, certainly it would because this is entirely on the cup quality. I didn't testify on the trial last fall of Buttfield against Bidwell that in my opinion a Hyson of a higher grade would be about equal to a gunpowder of three or four grades below, not in
48 cup quality, if I understood the question. I remember your asking me such a question and trying to find out whether you meant the value commercially or whether this schedule—its cup quality. It might be equal in value or worth more money and not have the cup quality of the Hyson.

"Q. Don't you remember testifying when I showed you on the previous trial an actual memorandum of the contents of one chop, showing it varied from gunpowder at 23 cents down to a Hyson at 7½ cents, that that was about the usual variation? A. I think it was a China invoice, giving the cost in taels, and I testified as far as I could see it was an ordinary invoice of tea from Shanghai."

That, as I remember it, was about an ordinary 49
proportion between a Hyson and gunpowder in the same chop of tea. I don't remember what the standard of tea of 1901 was worth when it was selected. I know the market was very much lower then than to-day. It might have been a ten and one-half cent tea when it was selected. The standard that is selected is a quantity of tea selected by the United States Board of Tea Experts, approved by the Secretary of the Treasury, as I understand it.

"Q. And it has to be uniform in quality in every way, all the tea in the same standard? A. For instance, a green tea standard has to be exactly alike; every ounce of the tea alike." 50

All the country green tea has got to be uniform all the way through, because it has got to be distributed throughout the various importing headquarters in this country, and also distributed among the buyers in the country from which the tea is to be imported. Therefore, in order to get a standard, an amount of tea for a standard for the coming year, you have got to find a large enough supply of tea of that uniform quality to meet that requirement. I do not know how large a supply is necessary for country green tea; I know it was an extremely small quantity, looking at it from a wholesale standpoint. I couldn't tell how many chests they buy. I think I did buy it once and I think I 51
bought only five chests.

(To the Court). It is several years since, but I think when I did buy it, four or five years ago, I bought five half-chests of tea, which is a very small quantity of green tea.

I think the buying season in China for green tea begins in the latter part of June. I am not conversant with the dates, and it runs usually until the market is exhausted of stock. These standards are announced for the season about the month of March so that they can be sent out to

52 China before the opening of the season, and the intention is that anybody who needs or desires to buy tea can obtain the Government standard in time to send to China so that the buyers will know what tea will be brought into the United States next season. The new standards, I believe, are adopted in February the following winter, before the next season begins.

JOSEPH H. LESTER, called for plaintiff, being duly sworn, testified as follows:

EXAMINED BY MR. BISHOP:

I reside in Brooklyn and my place of business is
53 at 97 Wall street. Up to three years ago I was a tea broker and had been in that business for thirty years. I am an expert in the quality and grades of tea and am familiar with the tea known as country green tea. Exhibit 8 shown to me correctly represents, I should think, the different grades of tea according to the quality of the tea, arranged from the highest to the lowest. I am familiar with the standard for country green tea for the year 1901, known as standard No. 7. The grade of that tea as compared with Exhibit 8, in reference to the quality, was the finest Teenkai and it would grade upon that schedule number 4. That standard would exclude all grades below that number. I am sufficiently
54 familiar with the country green teas to state that all of them below that grade are of such a kind and quality as to be fit for consumption, pure and free from adulteration, down to the lowest, No. 17. I should think that all the teas from 4 or 5 to No. 17 are pure, free from adulteration and fit for consumption. I have examined the particular teas in question, these eight packages, and I think, their grade and quality, as shown on that exhibit, was an On fine Teenkai. I think it was very pure and good tea, entirely free from adulteration, and certainly free from false or spurious leaves. There was nothing whatever about these teas to indicate in any

way that their grade or character was such that they were unfit for consumption or improper articles of food. 55

It is stipulated that the value of the teas is as claimed in the complaint.

[PLAINTIFF RESTS.]

GEORGE HEWLETT, called for the defendant, being duly sworn, testified as follows:

EXAMINED BY MR. WHITNEY:

56 I am engaged in the tea trade in this city, and have been for about eighteen years. The name of my firm is Hewlett & Lee. I am the vice-president of the National Tea Association of the United States, and am also chairman of the Board of Tea Experts of the Treasury Department, which I have been for about five years. I have examined the tea of Mr. Buttfield, about which he is complaining in this action. I examined this tea by the cup test, as described by the witnesses who have been on the stand this morning, and I found it to be a tea of a decidedly low grade, and on this schedule, Exhibit 8, I should grade it Fair Fychow; that would be No. 11. In my opinion it was a pure tea, but of a low quality. When this standard of 1901 was 57 adopted I was a member of the Board; that Board consisted of seven members, two from New York, two from Chicago, one from Boston, one from Philadelphia and one from San Francisco. Once a year all the members attended at the sessions of the Tea Board. All the members attended at various sessions. Every member was not present all the time that the Board was in session. In my opinion the quality, using the phraseology of Exhibit 8, of the tea which was selected as the standard by the Board, was a Hyson of a fine Teenkai chop. By a

58 Hyson I mean one of the last lines in an invoice of green tea made out of the coarsest leaf on the invoice. It is made out of the coarsest leaf, and the gunpowder is the finest leaf, and there is a gradation between Hyson and gunpowder, so that by selecting a Hyson of a fine Teenkai we select the coarsest and poorest of that fine Teenkai. There is a considerable variation in the value between Hyson and gunpowder of the same chop, between the head line of the chop, it is called the extra gunpowder. The first gunpowder is ordinarily better than the Hyson. There would be a variation in the different chops, but in a general way I should say that a Hyson of the grade 6 would correspond in
59 value to a first gunpowder of about grade No. 9, of the grades on this schedule. Usually tea deteriorates in quality after it is imported into this country. In my opinion, according to this statement, Exhibit 8, a tea would be expected to deteriorate in the course of a year about one grade, and it is necessary in selecting standards one year to compare with the importations of the following year to allow for that deterioration then. At the time this Hyson of a fine Teenkai was selected as the sample, the Board made diligent search for any teas of lower grades—Hysons of lower grades—of pure teas in the New York market and obtainable by the trade, speaking of country green teas and were unable to
60 find any.

CROSS-EXAMINATION BY MR. BISHOP:

I found these eight packages of teas to be a first gunpowder grade. That refers to the style and appearance of the tea. By style and appearance I mean the shape and appearance of the dry leaf; that is to say, I mean that the gunpowder tea is a tea rolled up into small pellets, and a Hyson tea is one in which the leaf is more expanded and larger. That hasn't necessarily anything to do with the drinking quality of the tea, that is the Hyson tea is

coarser in size than the gunpowder tea. This standard country green tea No. 7 for the year 1901, the tea we are discussing, is a fine quality of tea. I should say that there were not a good many qualities of tea below that standard that were entirely palatable. In my opinion there were grades inferior to No. 7 which were perfectly pure, genuine tea leaves, free from adulteration and different from standard only in the flavor. That was true in regard to these teas in question—the eight packages that they differed from the standard only in flavor, that is, the flavor in my opinion was decidedly inferior to the flavor of the standard, that is the only distinction that I found between these teas and the standard. 61 62

REDIRECT-EXAMINATION BY MR. WHITNEY:

In my opinion there were no teas in the market at that time when the standard was selected that could have been obtained that were pure and that were inferior in cup quality to these teas which were selected as the standard, because I took pains to have diligent search made for such teas as could be bought in the necessary quantity for use as Government samples, and while such teas are produced they were not available for selection when the board was in session for the selection of samples.

The cause of the difference in value between the Hyson and gunpowder—the extra gunpowder—is that the gunpowder is made from the smaller leaf of the plant rolled up, presumably the youngest and most delicately flavored leaf; whereas the Hyson, being a large coarse leaf tea, is usually made from the oldest leaf and has a coarser flavor than the tea made from the young leaves. I mean that the Hyson does ordinarily have a coarser and poorer flavor than the gunpowder and that the Hyson of one grade in my opinion is usually equal in value to the best gunpowder of some grades below would arise from the fact that ordinarily it does not taste better 63

64 or smell better than the highest gunpowder of three or four grades below.

The price of this tea that was selected as the standard in 1901 was 10½ cents. The average price of country green teas at that time was about 16 cents I should say, and if we had been able to obtain such tea for the standard of a lower grade that was pure and fit for comsumption, its price would have been at that time about 9 cents I should say.

RECROSS-EXAMINATION BY MR. BISHOP:

When I say the average price of country green teas was 16 cents I mean that that was the average
65 price of the whole invoice of tea. I mean the entire crop of country green tea. I mean that the average price of the entire crop of country green tea was 16 cents; that is a general statement of my idea. I don't remember what the average price of the entire crop of country green teas was for the previous year. My impression is that the average price of the entire crop of country green teas for the succeeding year, 1902, was slightly higher, not more than a cent a pound higher. I don't know how many chests of country green tea were imported into this country in the year 1900. It is too dim in my memory to give it accurately. I can't say the number of half chests of country green teas
66 imported in 1902. I should say approximately 150,000 half chests. I can't give you the importations of half chests of country green tea for the year 1901; I think it was above the figure I have just mentioned. I am not confident of the figures I have just given; I arrived at them from an attempt to remember the facts. The value of the rejected tea at the time of the rejection was, I think, in the neighborhood of 20 cents per pound.

(To Mr. Whitney.) That value is in bond.

Before the duty was paid. While the standard was worth only 10½ cents the ones that were rejected were worth 20 cents largely because of the

better appearance of the dry leaf. It would be true 67
that an extra gunpowder might be inferior in cup quality—that is, in taste and flavor—to a Hyson tea, we will say, of fine quality, only if the extra gunpowder was from a chop of a very much lower grade. If they were of the same chop, then in my opinion the gunpowder would be of superior quality to the Hyson. It would have a superior taste no matter what the grade of the Hyson was when they were from the same chop.

Taking a gunpowder tea and a Hyson tea from the same chop I do not think it would be possible that the gunpowder tea might be inferior in quality to the Hyson.

68

REDIRECT-EXAMINATION BY MR. WHITNEY:

The condition of the trade makes it happen that a tea which is inferior to another in quality is higher in price because the leaf looks better, that is, the condition that people will pay a price for the good appearance of the dry leaf of the tea. They pay a better price for the appearance of the dry leaf, even if the flavor is really inferior, simply on account of its appearance. It is on account of the fact that people who buy tea from them buy it on the appearance and not on the taste and flavor. Another reason why the appearance should increase the value of the tea, if the flavor is inferior, 69
is that ordinarily a good appearance of the dry leaf indicates a reasonably good drawing quality. But if one tea is very much superior to another in quality but the appearance of the dry leaf is not so good, there is no other reason that I know of why the tea which looks better in the leaf should be higher in price.

[DEFENDANT RESTS.]

70 W. J. BUTTFIELD, called in rebuttal.

EXAMINED BY MR. BISHOP:

At the time that this standard No. 7 was adopted, there were many thousands of packages of a lower quality than the standard was. My firm owned at that time three or four thousand packages that were of lower quality than the standard selected. There were standards extending from "five" down to at least "thirteen," procurable at that time. They had been admitted under the United States government standard for the year 1900. If this standard No. 7 for the year 1901 had been enforced, 75 per cent. of the entire crop of country green teas would have
71 been excluded. And assuming that a standard such as Mr. Hewlett has described this to be—that is, a standard of fine Teenkai had been adopted it would have excluded 70 per cent. of the entire crop of country green teas. And assuming that a standard of similar fineness of quality had extended throughout the entire importation of teas it would have excluded 75 to 80 per cent. of all the teas that are usually imported into this country.

HENRY C. THORN, recalled in rebuttal.

EXAMINED BY MR. BISHOP:

I am familiar with the quantity of country green teas which were here at the port of New York at
72 the time when the standard for 1901 was adopted, not in exact figures, but practically so. There were thousands of packages of country green teas of lower grades than the standard which were pure, unadulterated, of good quality and fit for consumption, which were procurable for standards. My experience on that subject is that I was requested by a clerk of one of the Board of Tea experts to get up the market, and I got them up many samples and sent them up into his office, but none of them were accepted for that season.

(To Mr. Whitney.) I knew that the several thousand packages of teas lower than the Hyson, of a

fine Teenkai, at that time were pure, by looking 73
over the samples, drawing them and having a general idea of the tea market. I don't know how many samples I draw at that time lower than fine Teenkai because I draw tea all day, every day of the year. I never draw tea in any way excepting English breakfast tea, except by single weight; it is the custom of the trade to draw all teas single weight. I always draw them single weight. Any impurity or adulterated leaves would show just as well single weight as double. I do not like to put myself against the regulations of the United States Government, but I cannot see why the double weight is a superior test for ascertaining the impurities in teas. In my opinion, the regula- 74
tions of the United States Government are apparently defective in that respect.

JOSEPH H. LESTER, recalled in rebuttal:

EXAMINED BY MR. BISHOP:

I was familiar with the supply of country green teas at the port of New York at the time when this standard in question was selected, and I can state that there were teas which were pure, free from adulteration, good quality and fit for consumption, lower than the standard in quality, to be had in the City of New York. My knowledge is that there were a great many here at that period; thousands 75
of half chests. If this standard for country green teas for the year 1901 had been enforced, it would have excluded a very large proportion of the entire crop of country green teas, 75 to 80 per cent., I should think.

There is nothing in this particular kind of country green tea which makes it inferior as a class, an inferior class of teas. I should think it would compare very favorably with other kinds of tea. And if this standard of fineness, &c., adopted as the standard in this particular case of country green tea had been employed as the standard in the general body of

76 teas, about the same proportion of the general crop would have been excluded as that of green tea; three-fourths of the crop.

CROSS-EXAMINATION BY MR. WHITNEY:

"Q. These lower grade teas in 1901, were they free from coloring matter? A. No green tea is free from coloring matter.

"Q. Their coloring matter is not tea, is it? A. Well, it is on all tea.

"Q. Then, as a matter of fact, all the teas that you are speaking of, of lower grade than the Hyson of a fine Teenkai in 1901, did have coloring matter? A. So did the standard.

77 "Q. Had not the lower grades considerably more coloring matter than the standard? A. Not necessarily; may have had less.

"Q. Didn't they as a matter of fact? A. No.

"Q. Did you, as a broker, make the necessary tests to find out whether they did have more coloring matter than the standard? A. The Tea Association was requested by the experts——

"Q. I am asking whether you personally made tests? A. I am telling you my position.

"Q. Inform me what you personally did in the way of making tests to ascertain the amount of coloring matter? A. The Tea Association was requested by the New York——

78 "Q. No matter about that. Tell me what you personally did? A. I am telling what I did personally. I was on that Board.

"Q. Tell me personally and not the Tea Association; what did you do personally about drawing tea? A. We examined these teas that were sent in to us as being suitable for standards, and it was sent over to the United States Board of Tea Experts, and they were all rejected as being too poor.

"Q. You thought they did not have too much coloring matter, and the Board of Tea Experts thought they did? A. We thought they were proper standards."

[TESTIMONY CLOSED.]

Mr. Whitney: I move for a direction of a verdict 79
for the defendant.

The Court: There is no distinction between this case and the other as a matter of law, is there?

Mr. Bishop: There is one distinction.

The Court: In this one the tea was destroyed and the other it was not.

Mr. Bishop: And that raises the question of whether there was due process of law, and whether the act provides for due process of law. This was simply the arbitrary seizure of the goods and its destruction without any hearing or opportunity for hearing or trial.

The Court: I understand that the object of ma- 80
king this case now is to have the Supreme Court pass upon that question in addition to the other, is it not?

Mr. Bishop: Yes, but it is not to have the Supreme Court pass upon it. It is to have your Honor pass upon it.

The Court: The statute permits the act of the Collector, does it not?

Mr. Bishop: The statute says the Collector shall destroy these teas under certain circumstances.

The Court: The question is whether the statute is repugnant to the Constitution.

Mr. Bishop: The Collector did what he was required to do under the law.

The Court: I think the case had better go to the 81
Supreme Court upon that question. As long as the question must go there on the other case this might go with it.

Mr. Bishop: I ask the Court to direct a verdict for the plaintiff for the amount of the damages proved, on the following grounds:

FIRST.—That the action of the Secretary of the Treasury in fixing and establishing the standard No. 7 for country green teas by regulation promulgated March 21, 1901, was void and of no

82 effect, and afforded no justification to the defendant in excluding the plaintiff's teas from import, because said act of the Secretary of the Treasury was an attempted exercise of legislative power to regulate commerce, which power, by the Constitution of the United States, is conferred upon Congress alone and cannot be delegated by it.

SECOND.—That the Act of March 2, 1897, entitled "An act to prevent the importation of impure and unwholesome tea," in so far as it authorized the Secretary of the Treasury to determine what teas may be imported into the United States by citizens thereof, is unconstitutional and void, because such
83 power can be exercised only by Congress, and cannot be delegated by it to any other person or body.

THIRD.—That since the evidence shows that the teas offered by the plaintiff for import, were genuine, pure and wholesome, free from adulteration, fraud and deception and fit for consumption, and had heretofore been and now are ordinary subjects of commerce, the act of the Secretary of the Treasury in fixing and establishing a standard by regulation dated March 21, 1901, which excluded said teas from import, was unlawful, and the act of March 2, 1897, in so far as it authorized the fixing and establishing of such standards by said Secre-
84 tary, was in contravention of the Constitution of the United States, as depriving the plaintiff of his property and liberty without due process of law, and the said action of the Secretary of the Treasury afforded no justification to the defendant in rejecting said teas from import.

FOURTH—That Congress has no authority under the Constitution of the United States to pass a law restraining the plaintiff, a citizen of the United States, from importing, selling or dealing in teas

which are ordinary subjects of commerce and which 85
are not injurious to the public health, morals or welfare, and the act of March 2, 1897, in so far as it does prevent the plaintiff from importing, selling or dealing in such teas, is unconstitutional and void as depriving the plaintiff of his property and liberty without due process of law, and affords no justification to the defendant in excluding such of the plaintiff's teas in controversy as were ordinary subjects of commerce and were not injurious to the public health, morals or welfare.

FIFTH—That Congress cannot lawfully enact a law preventing a citizen of the United States from dealing in a wholesome article of food, unless the 86
restraint imposed upon the citizen has some tendency to protect the public health, morals or welfare, and that the Act of March 2, 1897, so far as the same authorized the Secretary of the Treasury to exclude teas merely on the ground of quality, based on taste and flavor, having no relation to or indicative of anything deleterious or injurious to the health or prejudicial to the public welfare, is unconstitutional and void as being an encroachment, unauthorized by the Constitution, on the liberty of a citizen, and that the said act and the regulations adopted thereunder affords no protection to the defendant in rejecting the plaintiff's teas, upon the ground of quality, based on taste and flavor, having 87
no relation to nor indicative of anything deleterious or injurious to the health or prejudicial to the public welfare.

I ask the Court to direct a verdict in favor of the plaintiff, also on the ground that it appears that the Secretary of the Treasury established the standard in question which excluded teas which were not of the lowest grade, neither demonstrably of inferior purity or unfit for consumption, or presumably or possibly so, because of their inferior quality; and that the teas offered for import as shown by plain-

88 tiff's witnesses, were not of the lowest grade of tea, were not demonstrably of inferior purity or unfit for consumption, or presumably or possibly so because of their inferior quality.

Also upon the following further grounds: That the proceedings taken by the tea examiner and the Tea Board of the United States General Appraisers and the Collector in the condemnation and rejection of said teas, under the Act of March 2, 1897, afford no justification to the Collector in the destruction thereof, because Congress had no power to enact a law prohibiting the importation of pure and wholesome teas, a proper article of commerce, except in the exercise of its power to lay and collect taxes,
89 duties, imposts and excise, and to provide for the common defense and general welfare, and that said act was not passed for any of said purposes.

Also, that the decision of the examiner and of the Tea Board of the United States General Appraisers affords no protection to the Collector in the destruction of the said teas for the reason that the owner of the teas was afforded no hearing or opportunity of hearing, and that his property was seized and destroyed without due process of law.

Motion denied. Exception taken.

The Court: GENTLEMEN OF THE JURY: There is no question of fact in this case. The only question is
90 one of law, which will be determined ultimately by the Supreme Court of the United States; that is, the constitutionality of the act under which the Collector of the port acted.

Therefore, you will find a verdict for the defendant.

The jury rendered a verdict for the defendant.

Inasmuch as the proceedings, evidence, objections, instructions, rulings and exceptions contained in the foregoing bill do not appear on record in this cause,

I, ALFRED C. COXE, a Judge of said Court, who 91
presided at the trial of said cause, after due notice being given to the defendant in said cause, have settled and signed said bill of exceptions and ordered that the same be made a part of the record in this cause, this 19 day of May, 1903.

ALFRED C. COXE,
U. S. Cir. Judge.

Approved in form.
EDWARD B. WHITNEY,
Of Counsel for Defendant.

(Endorsed)—U. S. Circuit Court.—Filed May 20. 1903.—Southern District New York.—John A, Shields, Clerk.

WILLIAM J. BUTTFIELD, Appellant, *against* NEVADA N. STRANAHAN, Collector of the Port of New York, Appellee.	Assignments of Error on Appeal.

And now on this 22d day of April, 1903, comes the appellant, William J. Buttfield, by James L. Bishop, Esquire, his attorney, and says that in the record and proceedings in the above entitled matter there is manifest error in this, to wit:

First. That the court erred in denying the motion made by the appellant herein, for the direction of a verdict in his favor for damages proved, for the reason that the action of the Secretary of the Treasury in fixing and establishing the standard No. 7 for country green teas by regulation promulgated March 21st, 1901, was void and of no effect, and afforded no justification to the defendant in excluding the plaintiff's teas from import, because said act of the Secretary of the Treasury was an attempted exercise of legislative power to regulate commerce, which power, by the Constitution of the United States, is conferred upon Congress alone and cannot be delegated by it.

Second. That the court erred in denying the motion made by the appellant herein, for the direction of a verdict in his favor, for damages proved, for the reason, that the act of March 2d, 1897, entitled "An act to prevent the importation of impure and unwhole-
45 some tea" in so far as it authorized the Secretary of the Treasury to determine what teas may be imported into the United States by citizens thereof, is unconstitutional and void because such power can be exercised only by Congress, and cannot be delegated by it to any other person or body.

Third. That the court erred in denying the motion made by the appellant herein, for the direction of a verdict in his favor, for damages proved for the reason that, since the evidence shows that the teas offered by the plaintiff for import were genuine, pure and wholesome, free from adulteration, fraud and deception, and fit for consumption, and had heretofore been and now are ordinary subjects of commerce, the act of the Secretary of the Treasury in fixing and establishing a standard by regulation dated March 21st, 1901, which excluded said teas from import, was unlawful, and the act of March 2d, 1897, in so far as it authorized the fixing and establishing of such standards by said Secretary, was in contravention of the Constitution of the United States, as depriving the plaintiff of his property and liberty without due process of law, and the said action of the Secretary of the Treasury afforded no justification to the defendant in rejecting said teas from import.

Fourth. That the court erred in denying the motion made by the appellant herein, for the direction of a verdict in his favor, for damages proved for the reason that Congress has no authority under the Constitution of the United States to pass a law restraining the

plaintiff, a citizen of the United States, from importing, sell
46 ing, or dealing in teas which are ordinary subjects of commerce and which are not injurious to the public health, morals or welfare, and the act of March 2d, 1897, in so far as it does prevent the plaintiff from importing, selling or dealing in such teas, is unconstitutional and void as depriving the plaintiff of his property and liberty, without due process of law, and affords no justification to the defendant in excluding such of the plaintiff's teas in controversy as were ordinary subjects of commerce and were not injurious to the public health, morals or welfare.

Fifth. That the court erred in denying the motion made by the appellant herein for the direction of a verdict in his favor, for damages proved for the reason that Congress cannot lawfully enact a law preventing a citizen of the United States from dealing in a wholesome article of food, unless the restraint imposed upon the citizen has some tendency to protect the public health, morals or welfare, and that the act of March 2d, 1897, so far as the same authorized the Secretary of the Treasury to exclude teas merely on the ground of quality, based on taste and flavor, having no relation to nor indicative of anything deleterious or injurious to the health or prejudicial to the public welfare, is unconstitutional and void as being an encroachment, unauthorized by the Constitution, on the liberty of a citizen, and that the said act and the regulations adopted thereunder affords no protection to the defendant in rejecting the plaintiff's teas upon the ground of quality, based on taste and flavor, having no relation to nor indicative of
47 anything deleterious or injurious to the health or prejudicial to the public welfare.

Sixth. That the court erred in denying the motion made by the appellant herein for the direction of a verdict in his favor for damages proved for the reason that it appears from the testimony introduced by the plaintiff that the Secretary of the Treasury established the standard in question, which excluded teas which were not of the lowest grade, neither demonstrably of inferior purity or unfit for consumption, or presumably or possibly so, because of their inferior quality; and that the teas offered for import, as shown by the plaintiff's witnesses, were not of the lowest grade of tea, were not demonstrably of inferior purity or unfit for consumption, or presumably or possibly so because of their inferior quality.

Seventh. That the court erred in denying the motion made by the appellant herein for the direction of a verdict in his favor for the damages proved, for the reason that the proceedings taken by the tea examiner and the tea board of United States general appraisers and the collector in the condemnation and rejection of said teas, under the act of March 2d, 1897 afford no justification to the collector in the destruction thereof, because Congress had no power to enact a law prohibiting the importation of pure and wholesome teas, a proper article of commerce, except in the exercise of its power to lay and collect taxes, duties, imposts and excise, and to provide for

the common defense and general welfare, and the said act was not passed for any of said purposes.

48 Eighth. That the court erred in denying the motion made by the appellant herein for the direction of a verdict in his favor for the damages proved, for the reason that the decision of the examiner and of the tea board of the United States general appraisers affords no protection to the collector in the destruction of the said teas, for the reason that the owner of the teas was afforded no hearing or opportunity of hearing, and that his property was seized and destroyed without due process of law.

Ninth. That the court erred in granting the motion made by the appellee herein for a direction of a verdict in his favor.

Wherefore the said appellant prays that the judgment entered herein in the circuit court of the United States for the southern district of New York, be reversed and that the said circuit court of the United States for the southern district of New York be ordered to enter judgment for the plaintiff herein for the damages proved upon the trial of the action.

JAMES L. BISHOP,
Attorney for Appellant.

Office & P. O. address, 135 Broadway, borough of Manhattan, New York city.

(Endorsed:) Supreme Court of the U. S.—William J. Buttfield, appellant, against Nevada N. Stranahan, collector of the port of New York, appellee.—Assignments of error on appeal.—James L. Bishop, attorney for appellant, No. 135 Broadway, New York city.—A copy of the within paper has been received at this office, April 22, 1903, Henry L. Burnett, U. S. attorney.—U. S. circuit court, southern district of New York, Filed Apr. 22, 1903, John A. Shields, clerk.

49 Circuit Court of the United States for the Southern District of New York.

WILLIAM J. BUTTFIELD
vs.
NEVADA N. STRANAHAN, Collector of the Port of New York.
} Bond for Damages and Costs.

Know all men by these presents, that, the Fidelity and Casualty Company of New York, a corporation duly organized and existing under the laws of the State of New York, with principal office at No. 97 Cedar street, in the city, county and State of New York, is held and firmly bound unto the above named, Nevada N. Stranahan, collector of the port of New York, in the sum of two hundred and fifty dollars ($250.00) to be paid to the said Nevada N. Stranahan, collector of the port of New York, for the payment of which,

well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seals, and dated this eighteenth day of May, one thousand nine hundred and three.

Whereas, the above named, William J. Buttfield has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the circuit court of the United States for the southern district of New York, rendered in the above entitled suit.

Now therefore, the condition of this obligation is such that
50 if the above named, William J. Buttfield, shall prosecute said writ of error to effect, and answer all damage and costs, if he shall fail to make his plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
[SEAL.] By EDW. C. LUNT, *3d Ass't Sec'y.*

Form of Justification.

The Fidelity and Casualty Company of New York, surety, 97–103 Cedar street, New York city.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

On this eighteenth day of May, 1903, personally appeared before me Edward C. Lunt, known to me to be the 3rd ass't secretary of the Fidelity and Casualty Company of New York, who being by me duly sworn, deposes and says that he resides in New York city, State of New York, that he is the 3rd ass't secretary of the said The Fidelity and Casualty Company of New York and knows the corporate seal thereof; that the said company is duly and legally incorporated under the laws of the State of New York; and that the liabilities of the company do not exceed its assets as ascertained in the manner provided in section 3, chapter 720, of the New York Session Laws of 1893; and he further deposes and says that the following is a true copy of an extract from article III, of the by-laws of said company, whereby is shown the power vested in the president:—

51 "It shall be the duty of the president, or vice-president, to "preside at the meetings of the board of directors, and to "perform whatever belongs to the executive department of the "board. He may make insurances and all other contracts on behalf "of the company, sign conveyances of real estate, make transfers of "stock and securities, execute satisfaction pieces of mortgages, and "use the seal of the company when necessary in the business of the "company. He may appoint agents and qualify them by certificates "of authority to execute contracts of insurance on behalf of the com-"pany."

He further deposes and says that the following is a true copy of an extract from the minutes of the meeting of the board of directors of the company, held at its office in the city of New York, on the 19th day of November, 1902, a quorum being present, and that the resolution contained in said extract was unanimously adopted and is now in full force and effect:

"On motion it was duly resolved—that each of the follow-
"ing persons, to wit: Robert J. Hillas, of the town of West Ho-
"boken, State of New Jersey, treasurer-secretary of the company,
"Henry Crossley, of the borough of Brooklyn, city and State of New
"York, assistant secretary of the company, Frank E. Law, of East
"Orange, State of New Jersey, second assistant secretary of the com-
"pany, and Edward C. Lunt, of the borough of Brooklyn, city and
"State of New York, third assistant secretary of the company, is
"hereby jointly and severally, authorized to execute on behalf of
"the Fidelity and Casualty Company of New York, bonds, under-
"takings and all contracts of suretyship, and to bind said
52 "company as surety; and to attest the corporate seal of the
"company to any and all bonds, undertakings and all con-
"tracts of suretyship which shall have been signed by George F.
"Seward, the president of the company, or by either of the other
"secretaries designated herein."

He further deposes and says that the seal affixed to the annexed bond of William J. Buttfield is the corporate seal of the said The Fidelity and Casualty Company of New York, and was thereto affixed by order and authority of the board of directors of said company, and that he signed his name thereto by like order and authority as 3rd ass't secretary of said company; and that he is acquainted with him — to be the — secretary of said company; and that the signature of said —— —— subscribed to said bond is in the genuine handwriting of said —— ——, and was thereto subscribed by order and authority of said board of directors, or the by-laws of said company, and in the presence of said deponent.

[SEAL.] EDW. C. LUNT.

Acknowledged and sworn to before me and subscribed in my presence this eighteenth day of May, 1903.

[SEAL.] C. M. CRANE,
Commissioner of Deeds, City, County, and State of New York.

(Endorsed:) Approved as to form and also as to sufficiency of sureties, with reservation however, to the defendant of the right at any time to examine the proper officers of the surety company
under oath, touching its assets, liabilities and financial condi-
53 tion generally. Alfred C. Coxe, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed May 20, 1903, John A. Shields, clerk.

54 By the Honorable Alfred C. Coxe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to Nevada N. Stranahan, collector of the port of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 15th day of June 1903, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William J. Buttfield, is appellant and you are respondent to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 19th day of May, in the year of our Lord one thousand nine hundred and three, and of the Independence of these United States the one hundred and twenty-seventh.

ALFRED C. COXE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

55 [Endorsed:] E & A C 2042 Supreme Court of the United States. William J. Buttfield appellant *vs.* Nevada N. Stranahan, collector of the port of New York, respondent. Citation. James L. Bishop att'y for appellant 135 Broadway Manhattan New York city. A copy of the within paper has been this day received at this office May 20, 1903 Henry L. Burnett, U. S. attorney. S. 10 p'd.

56 [Endorsed:] United States Supreme Court. William J. Buttfield, pl'ff in error, *vs.* Nevada N. Stranahan collector of customs at the port of New York, def't in error

Endorsed on cover: File No. 18,945. S. New York C. C. U. S. Term No. 294. William J. Buttfield, plaintiff in error, *vs.* Nevada N. Stranahan, collector of the port of New York. Filed May 26th, 1903.

26523

(18,947.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 296.

WILLIAM J. BUTTFIELD, PLAINTIFF IN ERROR,

vs.

GEORGE R. BIDWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between William J. Buttfield, plaintiff, and George R. Bidwell, defendant, a manifest error hath happened, to the great damage of the said William J. Buttfield, plaintiff, as is said and appears by his complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 20th day of April 1903, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23d day of March, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-seventh.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

ALFRED C. COXE,
U. S. Circuit Judge.

2 [Endorsed:] E & A C 2025 Supreme Court of the United States. William J. Buttfield plaintiff in error, *vs.* George R. Bidwell defendant in error. Writ of error. James L. Bishop attorney for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this — day of ——, 189–. ——— ———, attorney for defendant in error. A copy of the within paper has been this day received at this office Mar. 25 1903. Henry L. Burnett, U. S. attorney, N. Y. 1.45 p'd U. S. circuit court, southern district New York. Filed Mar. 25 1903 John A. Shields, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to 87 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of William J. Buttfield plaintiff in error, against George R. Bidwell, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-third day of May in the year of our Lord, one thousand nine hundred and three and of the Independence of the United States the one hundred and twenty-seventh.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 United States Circuit Court, Southern District of New York.

WILLIAM J. BUTTFIELD
against
GEORGE R. BIDWELL.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan in the city of [L. S.] New York, this 24th day of M'ch, in the year one thousand nine hundred and two.

JOHN A. SHIELDS, *Clerk.*

JAMES L. BISHOP,
Plaintiff's Attorney.

Office and post office address 135 Broadway, borough of Manhattan, New York city.

4 Circuit Court of the United States for the Southern District of New York.

WILLIAM J. BUTTFIELD, Plaintiff,
against
GEORGE R. BIDWELL, Defendant.

William J. Buttfield the above named plaintiff complains of George R. Bidwell, the above named defendant and respectfully states:

First. For a first cause of action:

I. The plaintiff is a citizen of the State of New Jersey and a resident of the said State; the defendant is a citizen of the State of New York and resides within said State and within the southern district of New York.

II. At all times hereinafter mentioned, the plaintiff was and now is a member of a firm doing business under the name of W. J. Buttfield, composed of the plaintiff as general partner and Charles W. McCutchen as special partner and organized as a limited partnership under and pursuant to the laws of the State of New York. The said firm is and at the times hereinafter mentioned, was, engaged in business at the city of New York as importers and dealers in tea.

At all times hereinafter mentioned the defendant was and now is duly appointed and commissioned collector of customs of the United States at the port of New York, and was, and is, in the unre-
5 stricted and actual exercise of his functions as such collector and fully vested with all the powers and authority of his office.

III. On or about the 14th day of Decembr, 1901, the defendant being such collector as aforesaid did under color of his said office and by the improper exercise of the powers and authority vested in him for the purpose of the performance of his duties as such collector, unlawfully prevent the plaintiff from importing into the United States 226 packages of country green teas shipped from China and consigned to the firm of W. J. Buttfield at the port of New York, and which said teas arrived at said port by the steamer "Arara."

IV. The said teas were of the class known as country green teas. The said teas being subject to import duty were duly entered with the defendant as collector of customs at the port of New York by the plaintiff's firm under entry No. 182,851.

V. The plaintiff after the entry of said teas, as aforesaid, submitted to the tea examiner at the port of New York samples of said teas and the said examiner reported to the defendant that the said teas were inferior in quality to the standard for such country green tea fixed and established by the Secretary of the Treasury and promulgated by certain regulations issued by the said Secretary of the Treasury March 21st, 1901, and the defendant thereupon notified the plaintiff that the said teas were prohibited from importation into the United States.

The plaintiff thereupon protested against the finding of the
6 said examiner, and thereafter, the board of United States general appraisers designated by the Secretary of the Treasury, reported to the defendant that the said teas were inferior in quality to the standards prescribed by law, and the defendant thereupon notified the plaintiff that his protest was overruled.

The defendant thereupon refused to permit the plaintiff to withdraw the said teas from the control of the defendant for consumption in this country and prohibited and prevented the plaintiff from taking any other action with regard to said teas except to export them from the United States.

The said action of the defendant in preventing the plaintiff from importing the teas into the United States for consumption and in refusing to permit the plaintiff from taking any other action in respect thereto except to export the same from the United States, were wholly unauthorized and illegal.

The plaintiff further alleges, that he has been at all times ready and willing and has offered to pay the customs duties upon said teas to the defendant.

VI. The plaintiff alleges, upon information and belief that the defendant prevented the plaintiff from importing the said teas into the United States and refused to permit the plaintiff to take any other action or control over said teas, except to export them from the United States under color of an act of Congress approved March 2, 1897, entitled "An act to prevent the importation of impure and unwholesome tea."

Plaintiff alleges, that the said act of Congress is illegal and
7 void, and is in violation of the Constitution of the United States, because it attempts to confer upon the Secretary of the Treasury, upon the recommendation of a board of seven tea experts appointed by him, the power to regulate commerce with foreign nations, and to authorize the Secretary of the Treasury to prevent commerce by the citizens of the United States with foreign countries in wholesome articles of food, to wit: in wholesome teas of a high character and quality, and because by the said act the plaintiff was and is unlawfully deprived without due process of law of his property and of his right to engage in a useful and beneficial industry, in nowise injurious to the health, morals or welfare of the people.

The plaintiff further alleges, that the Secretary of the Treasury upon the recommendation of a board of tea experts appointed by him, established a standard known as "No. 7 country green" teas by regulation promulgated March 21, 1901, and that the defendant prevented the plaintiff from importing the said teas into the United States, upon the ground that the said teas were inferior in purity, quality and fitness for consumption to the said standard "No. 7 country green" teas. The said act did not empower the Secretary of the Treasury to establish a standard which would exclude from import wholesome teas, free from adulteration, of a fine character and quality and fit for consumption.

The plaintiff alleges, that said standard so fixed and established, did exclude from import into the United States wholesome teas free from adulteration of fine character and quality and in every respect fit for consumption.

8 VII. The said 226 packages of country green tea rejected as aforesaid, were of a high quality and grade of tea, wholesome and free from adulteration and fit for consumption, and upon payment of the proper custom's import duties, the plaintiff was entitled under the laws of the United States that the same should be released by the defendant as the collector of customs at the port of New York, and that the same should be admitted into the United States as lawful importations upon payment of such duties.

VIII. The said 226 packages of country green teas were in purity, quality and fitness for consumption superior to any valid standard fixed and established pursuant to any valid statute of the United States; or according to any valid executive order or regulation of the United States the United States Treasury Department or of any agent or official thereof.

IX. By reason of the wrongful acts of the defendant above set forth, the plaintiff has been put to large expense in and about the shipment of the said teas, the unloading and loading of the same, and has been prevented from realizing the market price of the said teas at the port of New York at the date of their arrival as he might otherwise have done, and has been compelled to export and sell the same at a great loss, and has otherwise been put to loss to his damage in the sum of seven hundred dollars.

Second. For a second cause of action:

I. The plaintiff repeats and realleges, as a part of this cause of action, all the allegations contained in paragraphs I and II of the first cause of action.

9 II. On or about the 11th day of January, 1902, the defendant being such collector, as aforesaid, did under color of his said office and by the improper exercise of the powers and authority vested in him for the purpose of the performance of his duties as such collector, unlawfully prevent the plaintiff from importing into the United States 1275 packages of country green teas shipped from China and consigned to the firm of W. J. Buttfield at the port of New York, and which said teas arrived at said port by the steamers "Glengyle" and "Ataka."

III. The said teas were of the class known as country green teas. Said teas being subject to import duty, were duly entered with the defendant as collector of customs at the port of New York by the plaintiff's firm, 583 packages thereof in warehouse entry 207,944, and 692 packages thereof in warehouse entry 206,116.

IV. The plaintiff repeats and realleges as a part of this cause of action and concerning said 1275 packages of country green teas, all the allegations contained in paragraphs V, VI, VII and VIII of the first cause of action.

V. By reason of the wrongful acts of the defendant above set forth,

the plaintiff has been put to large expense in and about the shipment of the said teas, the unloading and loading the same, and has been prevented from realizing the market price of the said teas at the port of New York at the date of their arrival, as he might otherwise have done, and has been compelled to export and sell the same at a great loss, and has otherwise been put to loss to his damage in the sum of fifteen hundred dollars.

10 Third. For a third cause of action:

I. The plaintiff repeats and realleges, as a part of this cause of action, all the allegations contained in paragraphs I and II of the first cause of action.

II. On or about the 18th day of February, 1902, the defendant being such collector as aforesaid, did under color of his said office and by the improper exercise of the powers and authority vested in him for the purpose of the performance of his duties as such collector, unlawfully prevent the plaintiff from importing into the United States 189 packages of country green teas shipped from China and consigned to the firm of W. J. Buttfield at the port of New York, which said teas arrived at said port by the steamer "Satsuma."

III. The said teas were of the class known as country green teas. Said teas being subject to import duty were, duly entered with the defendant as collector of customs at the port of New York by the plaintiff's firm under entry No. 8,016.

The said refusal of the defendant to release the said teas upon payment of said duties, and the demand on his part for such certificate or finding as a condition of the right of the plaintiff to import the said teas into the United States, were wholly unauthorized and illegal.

IV. The plaintiff repeats and realleges, as a part of this cause of action, and concerning the said 189 packages of country green teas, all the allegations contained in paragraphs V, VI, VII and VIII in the first cause of action.

V. By reason of the wrongful acts of the defendant, above
11 set forth, the plaintiff has been put to large expense in and about the shipment of the said teas, the unloading and loading of the same, and has been prevented from realizing the market price of the said teas at the port of New York at the date of their arrival, as he might otherwise have done, and has been compelled to export and sell the same at a great loss, and has otherwise been put to loss to his damage in the sum of two hundred dollars.

Fourth. For a fourth cause of action:

I. The plaintiff repeats and realleges as a part of this cause of action, all the allegations contained in paragraphs I and II of the first cause of action.

II. On or about the 12th day of March, 1902, the defendant being such collector, as aforesaid, did under color of his said office and by the improper exercise of the powers and authority vested in him for the purpose of the performance of his duties as such collector,

unlawfully prevent the plaintiff from importing into the United States 258 packages of country green teas, shipped from China and consigned to the firm of W. J. Buttfield at the port of New York, which said teas arrived at said port by the steamer "Adana."

III. The said teas were of the class known as country green teas. Said teas being subject to import duty were duly entered with the defendant as collector at the port of New York by the plaintiff's firm under entry No. 13,326.

IV. The plaintiff repeats and realleges, as a part of this
12 action, and concerning the said 258 packages of country green teas, all the allegations contained in paragraphs V, VI, VII and VIII in the first cause of action.

V. By reason of the wrongful acts of the defendant above set forth, the plaintiff has been put to large expense in and about the shipment of the said teas, the unloading and loading of the same, and has been prevented from realizing the market price of the said teas at the port of New York at the date of their arrival, as he might otherwise have done, and has been compelled to export and sell the same at a great loss, and has otherwise been put to loss to his damage in the sum of four hundred dollars.

Wherefore this plaintiff demands judgment against the defendant for the sum of twenty-eight hundred ($2800.00) dollars with interest on seven hundred ($700.) dollars from the 14th day of December, 1901, and on fifteen hundred ($1500.) dollars thereof from January 11th, 1902, and two hundred ($200.) dollars thereof from February 18th, 1902 and on four hundred ($400.) dollars thereof from the 12th day of March, 1902, together with the costs of this action.

JAMES L. BISHOP,
Attorney for Plaintiff.

P. O. address and office, 135 Broadway, Manhattan borough, New York.

SOUTHERN DISTRICT OF NEW YORK, }
County of New York, } ss:

William J. Buttfield, being duly sworn deposes and says:
13 That he is the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM J. BUTTFIELD.

Sworn to before me this 24th day of March, 1902.

[SEAL.]

C. B. C. FOWLER,
Notary Public for Kings Co., and Certificate Filed in N. Y. Co.

(Endorsed:) Circuit court of the U. S., southern dist. of New York.—William J. Buttfield, plaintiff, *vs.* George R. Bidwell, defendant.—Complaint.—James L. Bishop, attorney for plaintiff, No. 135 Broadway, New York city.—I hereby certify, that on the 24th day of March, 1902, at the city of New York, in my district I served the within summons and complaint upon the within named George R. Bidwell, as collector of customs, &c. by exhibiting to F. A. McAvoy, as acting deputy collector of customs the within originals, and at the same time leaving with him a copy of each thereof. Wm. Henkel, United States marshal southern district of New York. Dated Mar. 24, 1902. U. S. circuit court, southern district of New York. Filed Mar. 24, 1902, John A. Shields, clerk.

14 Circuit Court of the United States for the Southern District of New York.

WILLIAM J. BUTTFIELD, Plaintiff,
against
GEORGE R. BIDWELL, Defendant. } Answer.

The defendant above named answers the complaint as follows:

I. He denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff is a citizen of the State of New Jersey.

II. He admits that at the times mentioned in the complaint and that at the commencement of this action he was the duly appointed and commissioned collector of customs of the United States at the port of New York, but he alleges that heretofore and shortly after the commencement of this action his resignation of said office took effect and he ceased to be collector.

III. He denies on information and belief each and every allegation of paragraphs III to IX inclusive of the first cause of action in said complaint; II to V inclusive of the second cause of action in said complaint; II to V inclusive of the third cause of action in said complaint; and II to V inclusive of the fourth cause of action in said complaint.

HENRY L. BURNETT,
United States Attorney.

15 FOR THE SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of New York,

George R. Bidwell, being duly sworn, says: I am the defendant above named. The foregoing answer is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

GEORGE R. BIDWELL.

Sworn to before me this 19th day of June, 1902.

FRANCIS B. ANTZ,
[SEAL.] *Notary Public.*

(Endorsed:) U. S. circuit court, southern district of New York.—William J. Buttfield *vs.* George R. Bidwell, Answer.—Henry L. Burnett, United States attorney, attorney for defendant.—A copy received June 20, 1902. James L. Bishop, attorney for Buttfield.—U. S. circuit court, southern district of New York, Filed Jun- 20, 1902, John A. Shields, clerk.

16 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court rooms in the borough of Manhattan in the city of New York, on Wednesday the 22nd day of October, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable Alfred C. Coxe, circuit judge.

WILLIAM J. BUTTFIELD
vs.
GEORGE R. BIDWELL.

Now comes the plaintiff by James L. Bishop, Esq., his attorney and moves the trial of this cause. Likewise comes the defendant by Edward V. Whitney, Esq., his attorney. Thereupon a jury is impaneled and the cause proceeds to trial. After hearing the evidence for the plaintiff and the argument of counsel the jury on Thursday October 23rd, 1902 by direction of the court say they find a verdict for the defendant and so say they all.

An extract from the minutes.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

17 United States Circuit Court, Southern District of New York.

WILLIAM J. BUTTFIELD, Plaintiff,
vs.
GEORGE R. BIDWELL, Defendant.

The above entitled action having come on for trial on a regular call of the calendar of said court at a session thereof held by the Honorable Alfred C. Coxe, circuit judge and a jury, on the 22nd day of October, 1902, in the United States court and post office building, in the city of New York, and said court having directed a verdict in favor of the defendant, and having ordered that judgment should be entered in said action in favor of the defendant against the plaintiff, with costs of said action, and said costs having been adjusted at the sum of twenty-four 50/100 dollars ($24.50/100)

Now on motion of Henry L. Burnett, United States attorney, for the defendant (Edward B. Whitney of counsel) it is

Ordered, adjudged and decreed that the defendant George R. Bidwell have judgment against the said plaintiff, upon the issues in said action dismissing the complaint upon its merits with costs, and

that he recover the sum of twenty-four 50/100 ($24.50/100) dollars costs, and that the defendant have execution therefor.

Judgment signed and entered this 12th day of March, 1903.

JOHN A. SHIELDS, *Clerk.*

18 Approved.

JAMES L. BISHOP,
Att'y for Pl'ff.

(Endorsed:) U. S. circuit court, southern district of New York.—William J. Buttfield, plaintiff *vs.* George R. Bidwell, defendant.—Judgment.—Henry L. Burnett, United States attorney, attorney for defendant.—U. S. circuit court, southern district of New York, Filed Mar. 12, 1903, 4.25 p. m., John A. Shields, clerk.

26525

United States Circuit Court,

1

SOUTHERN DISTRICT OF NEW YORK.

WILLIAM J. BUTTFIELD,
Plaintiff,

AGAINST

GEORGE R. BIDWELL,
Defendant.

Bill of Exceptions.

2

Be it remembered that at the Stated Term of the Circuit Court of the United States for the Southern District of New York, held at the Borough of Manhattan, City of New York, in said District, on the 22d day of October, 1902, the Honorable Alfred C. Coxe, a Judge of said Court, presiding, the above entitled cause coming on to be tried, the following proceedings were had, namely, a jury was duly impanelled and sworn.

APPEARANCES: 3

JAMES L. BISHOP and JAMES H. SIMPSON, for Plaintiff;

HENRY L. BURNETT, for Defendant; EDWARD B. WHITNEY, of Counsel.

The following contains all of the evidence and proceedings on the trial.

4 The plaintiff, to sustain the issues upon his part, called as a witness ROBERT HUNTER, who being duly sworn, was examined as follows:

By Mr. Bishop:

Q. You are connected with the Custom House? A. Yes, sir.

Q. What division or department? A. I am in the law division of the Custom House.

Q. Are the papers which are now produced by you the entries of the teas consigned to Mr. Buttfield by the steamer *Satsuma?* A. Yes, sir.

Q. And are these papers which I hand you the invoices of the goods covered by that entry? A. Yes,
5 sir.

The papers referred to are offered in evidence and marked Plaintiff's Exhibits 1 and 2.

Exhibit 1, is Invoice No. 9680 of teas arriving by S. S. *Satsuma*, none of which teas are included in this action.

Exhibit 2. is Invoice No. 9677 of teas arriving by S. S. *Satsuma*, of which the teas shown in Exhibit 3, were rejected as inferior to standard in quality.

Mr. Whitney: I assume this is only the 189 packages.

Mr. Bishop: Yes, sir.

6

Q. I show you Plaintiff's Exhibit 2 and I call your attention to the words and figures in red ink and I ask you to state what they are? A. It shows teas prohibited by law upon a report of the appraiser, our tea examiner.

Q. You can take this, then. I show you this. Are the marks and numbers on that paper similar to the marks and numbers on Exhibit No. 2? A. Yes, sir.

The paper referred to is offered in evidence and marked Plaintiff's Exhibit 3.

Plaintiff's Exhibit No. 3. 7

189 Packages Ex S. S. "SATSUMA"

Prohibited by Law.

Y T T F (in cross)	5	30	H/C	Inferior to Standard in quality.
"	6	33	"	
YYM (in diamond)	3	22	"	
E S M (in heart)	5	28	"	
S.K.T. (in triangle)	6	24	"	
P D T (in heart)	5/6	52	"	

8

Q. Please read from invoice No. 2 what is said with regard to these packages? A. "Is inferior to standard in quality. I. McG." That is the Examiner. "Dated January 24, 1902."

Q. Then referring to Exhibit 3, will you kindly state what those marks and numbers are? A. They are the marks and numbers of the packages of tea.

Q. Does it state how many packages of tea, the number of packages of tea? A. Yes, sir; it says thirty in one case.

9

Q. Does it state the number of packages of teas of each mark? A. Yes, sir.

Q. What does "H-F" mean there—the last mark? A. Half chest.

Q. Then that paper No. 3 shows the marks of the teas received by the steamer *Satsuma*? A. Yes, sir.

Q. The number of the packages of teas? A. Yes, sir.

Q. Of each mark? A. Yes, sir.

Q. And those are the teas which are shown on Exhibit No. 2 to have been rejected by the tea examiner for quality? A. Yes, sir.

Q. Will you hand me the entry for import in the case of the *Satsuma*? A. Yes, sir (producing).

Q. Is this paper which I show you, the entry for import of the teas by the steamer *Satsuma*? A. Yes, sir.

Paper offered in evidence and marked Exhibit 4.

Exhibit No. 4 is warehouse entry No. 8016, Bond No. 53,828, and includes Exhibits 1 and 2, together with invoices of other teas not rejected; also bills of lading, decision of Board of General Appraisers on rejected teas, weigher's returns, &c.

Warehouse bond given on said entry, offered in evidence and marked Exhibit 5.

The foregoing papers identify the 189 packages or half chests of tea with their respective marks and numbers, and upon the invoice is endorsed the aforesaid ruling of Isaac McGay, Esq., Examiner of Teas of the Port of New York.

Papers offered by Mr. Bishop and marked Exhibits 6, 7 and 8.

It is stipulated that the teas arriving by the steamers *Ataka*, *Adana* and *Glengyle* respectively, shown by said exhibits respectively, were entered for import by the plaintiff at the New York Custom House under Import Nos. 206,116, 13,326 and 207,944 respectively, in the same form as Exhibit 4; that the invoice including said teas was filed with the defendant in the same form as Exhibit 2; and that upon said invoice there is stamped in the same form as in said Exhibit 2, the tea examiner's ground of rejection as set opposite the marks and numbers on Exhibits 6, 7 and 8.

From said Exhibits 3, 6, 7 and 8 it appears that 189 packages or half chests from the steamer *Satsuma* were rejected by said Ex-

aminer as "inferior to standard in quality"; 13
that 605 ~~half~~ packages from the steamer *Ataka* were rejected by him as "inferior to standard in quality"; that 87 packages therefrom were rejected by him as "smoky Fychows, inferior to standard in quality"; that 258 packages from the steamer *Adana* were rejected by him as "inferior to standard in quality"; that 485 packages from the steamer *Glengyle* were rejected by him as "inferior to standard in quality," and that 148 packages therefrom were rejected by him as "inferior to standard in quality—smoky Fychows," and the marks and numbers of all the teas so rejected appear upon said exhibits. 14

It is also stipulated that a bond was given in each of the cases of the arrivals by the steamers *Adana* and *Glengyle* in the same form as Exhibit No. 5.

Q. Attached to Exhibit No. 2 there is a white paper; what is that, Mr. Hunter? A. That is the decision on the tea protest by the Board of General Appraisers.

Q. Referring to the teas shown in Exhibit No. 2 which the tea examiner rejected? A. Yes, sir.

Paper offered in evidence and marked Exhibit 9 and is on a printed form, the words and figures italicised not being part of said form, 15
but inserted therein, except the word "is" in the first paragraph thereof, which is a part of the form, but was underlined:

16 **Exhibit No. 9.**

OFFICE OF THE BOARD OF U. S. GENERAL APPRAISERS,

641 Washington Street,

NEW YORK, N. Y. February 15, 1902.

In replying,
refer to
Tea 1080,

COLLECTOR OF CUSTOMS,
Port of New York,
N. Y.

SIR:

17 In conformity with Section 8, of the Act of March 2, 1897, we have examined certain tea, or merchandise described as tea, designated by marks and numbers as herein below, imported by *W. J. Buttfield*, from *Shanghai*, per S. S. "*Satsuma*," entered *January 14th*, 1902, covered by the protest of *W. J. Buttfield*, transmitted by you on the *3rd* day of *Feby.*, 1902, and we find that the said tea *is* inferior in quality to the standards prescribed by law.

The appeal of the importer is accordingly *overruled*.

Respectfully,
WILBER F. LUNT,
W. B. HOWELL,
18 Board of General Appraisers.

Marks and numbers:

Y T T F (in cross)	No. 5,	P. D. T No. 5/6,
–"–	No. 6,	
Y. Y. M. (in diamond)	No. 3,	Invoice number 9677, inclosed.
E. S. M (in heart)	No. 5,	Samples mailed under separate cover.
S. K. T. (in triangle)	No. 6,	

Indorsed with a stamp as follows: "Correspondence received Feby. 17, 1902, N. Y. Custom House." 19
Indorsed in writing as follows: "App. & Importer notified Feby. 18/1902."

It is stipulated that a decision of the General Board of Appraisers, in form similar to Exhibit 9, was made in the case of teas shown on Exhibits 6, 7 and 8.

It is stipulated that a protest was made by the plaintiff against the findings of the tea examiners regarding the teas shown upon Exhibits 3, 6, 7 and 8, and that the matter was brought for decision before the Board of United States General Appraisers, said protest resulting 20
in the ruling shown in Exhibit 9 and the other rulings referred to in the stipulation relative to Exhibit 9.

Q. Mr. Hunter, are you familiar with the course of business at the Custom House with regard to these tea importations? A. Yes, sir.

Q. Under that custom can a tea importer withdraw any teas from bond before a ruling has been made and reports filed by the tea examiner? A. No, sir.

Q. Under the methods adopted at the Custom House, can a tea importer pay duties upon teas until they have been released by the action of the tea examiner? A. No, sir. 21

Q. Would a payment of duties upon teas under such circumstances be accepted? A. No, sir.

CROSS-EXAMINATION BY MR. WHITNEY:

Q. Mr. Hunter, I show you Exhibit 9 and notice that that is on a printed form; that is, printed in imitation of typewriting? A. Yes, sir.

Q. Is that the printed form always used by the Board of General Appraisers in their rulings on these protests? A. Yes, sir.

Q. The form reads at the end: "We find that the

tea is —— inferior in quality to the standard pre-
22 scribed by law." Now, where the ruling below is affirmed the word "is" is underlined, *and when it* is reversed the word "not" is inserted after "is." Is it not? A. Yes, sir.

JOHN W. RIDSDALE, being duly sworn for the plaintiff, testified as follows:

EXAMINED BY MR. BISHOP:

Q. Mr. Ridsdale, you are connected with the New York Custom House? A. I am.

Q. How long have you been connected with the
23 Custom House? A. Twenty years.

Q. In what department? A. In the third, or warehouse department.

Q. What position do you occupy there? A. I am chief withdrawal clerk and in charge of the room.

Q. You have been familiar with the course of business at the Custom House with regard to the importation of teas ever since the passage of the Act of 1897, have you not? A. I have a general idea, sir, of course, of entering goods, and have a correct one of withdrawal from warehouse.

Q. Now, state to us under what circumstances teas may be withdrawn from warehouse? A. On the payment of duties first. In the warehouse de-
24 partment we make an entry or copy of the warehouse entries you have here, on our ledgers. It lies in that state until such time as the importer presents a request to have certain samples taken for the general appraisers. As soon as the examiner makes his examination, the seventh division returns to us a list of these teas that have been released, or can be withdrawn by payment of duty,

Q. Can any other teas be drawn except such? A. No, sir, nothing but what has been released by the examiner.

Q. Have you with you the form used under such circumstances? A. I have a form of release. This

is the form sent to us from the seventh division, 25
taken from the invoice; the report of the examiner.

Q. *Is this* paper *which I* show you the blank form which is used? A. It is the form they receive. The one you have in your hand is signed by a deputy collector of the seventh division; that is the form we receive. We do not receive blank forms.

Q. But when it is signed by the deputy collector? A. That appears to be the same form, exactly, sir.

Mr. Bishop: This is offered in evidence, as the form referred to by the witness.

The Witness: The form upon which we act.

Marked Exhibit 10.

This form is headed "Permit for Release of Im- 26
ported Tea, examined by United States Officers under Act of March 2, 1897"; is dated at the Collector's office; is intended to be addressed to the importer, and is as follows:

"The following described tea imported by
in the
from on the
190 , viz. (Here follow marks and numbers, and description of merchandise), having been found by the United States Examiner not to come within the prohibition of the Act approved March 2, 1897, "to prevent the importation of impure and unwholesome tea" are hereby declared free from the control of the customs authorities so far as regards any 27
bond given pursuant to the regulations established under said Act," intended to be signed by a Deputy Collector.

Q. As I understand, such a permit as this signed by the Deputy Collector, must be received before any teas can be released? A. Before any withdrawal can be made on that bond.

Q. Teas which are not reported by the tea examiner or Board of General Appraisers as being equal to the standard in purity, quality and fitness for consumption, are not entered upon this blank? A. No, sir, not on that blank; only the released teas.

28 Q. Can an importer remove or withdraw for consumption from the bonded warehouse, teas which have been entered, without first obtaining a report of the tea examiner, or of the Board of General Appraisers, that the teas are equal to the standard in purity, quality and fitness for consumption? A. No, sir, he cannot.

Q. Can he pay the duties before such a report is presented? A. No, sir.

Q. An offer to pay duty under such circumstances would be useless? A. That would have to be made to the Collector. We would throw out the withdrawal on a tea not released. You can make an offer, of course, to the Collector to pay certain
29 moneys, but we should not pass the withdrawal.

Q. Have you any knowledge about the landing of the tea? A. It is not in our department. I understand the system. When the tea arrives by a vessel the importer presents his bill of lading and invoice to the second division, whereupon they make entries of the teas according to the bill of lading and invoice. Then a permit is given to an inspector directing him to send to a bonded warehouse so and so, all that tea. As soon as it is sent there it becomes in possession of the third division or warehouse division.

Q. Who signs that permit? A. Either the entry clerk or somebody in the second division; generally
30 signed by the deputy collector of the second division where all entries are made.

Mr. Bishop: I ask to have stricken out the last part of the answer to my question, "an offer to pay it under such circumstances would be useless."

Motion objected to, and denied.

Mr. Bishop: It is merely a conclusion of the witness as to what might be done with the Collector. I asked him whether in his department, under the control of his division, these teas would be released without the payment, and he said they would not. Now, what might be done elsewhere is immaterial.

The Court: The motion to strike out is denied. 31

Exception taken by Mr. Bishop.

Q. Is this the form of permit for landing which is used (showing)? A. That is the form of permit for landing.

Offered in evidence and marked Exhibit 11.

Exhibit No. 11.

ORDER TO SEND GOODS TO BONDED WAREHOUSE.

32

CUSTOM HOUSE, PORT OF NEW YORK,

....., 190 .

To the Inspector:

You are directed to send to the Bonded Warehouse, No. .....Street:

Marks.	Nos.	Description of Merchandise.	Ordered.

33

Imported on the ..... of .....

by .....

in the....., ... Master,

from .....

....

Naval Officer. Deputy Collector.

34 WILLIAM JAMES BUTTFIELD, being duly sworn, testified as follows:

EXAMINED BY MR. BISHOP:

Q. Mr. Buttfield, where do you reside? A. Plainfield, New Jersey.

Q. Are you a citizen of the United States? A. I am.

Q. What is your business? A. Tea importer.

Q. What is your firm? A. W. J. Buttfield.

Q. Who compose the firm? A. Charles W. McCutchen, special partner; myself, general partner.

Q. How long have you been engaged in the business of importing teas? A. I have been in the tea
35 trade twenty-one years, and in importing teas into the United States fifteen years.

Q. Are you familiar with the different qualities and grades of teas? A. I am.

Q. Have you had a large experience in that matter? A. Considerable.

Q. Can you state about what proportion of the teas imported at the port of New York are imported by your firm? A. I should think on an average about twenty per cent.

Q. Are you familiar with the standard No. 7 country green teas established by the regulations of the Secretary of the Treasury, March 21, 1901? A. Yes.

36 Q. What do you mean by country green teas? A. They are green teas that arrive from China that are grown in China in distinction to Ping Suey green teas, which are also grown in China.

Q. Do they come from certain localities? A. A certain district in China.

Q. Do they include teas which come from several parts of the same district? A. There are a number of districts grouped together in the portion of China from which these teas are imported.

Q. State whether these country green teas include various kinds of teas which have different

denominations, and then state what the denomina- 37
tions are? A. Country green teas are divided into four or five classes known as Moyune, Teenkai, Fychow, Wenchow and Shanghai packed.

Q. Does this schedule which I now show you state correctly the various grades of the kinds of teas which you have mentioned, by their quality? A. It does.

Paper offered in evidence.

Q. (By Mr. Whitney.) These various phrases on this schedule mean the trade names of the different qualities of teas? A. They do.

Q. And where it says "fully good medium Moyune," for instance, that means simply that that is 38
the trade name of that particular grade of Moyune? A. That is so.

Q. And that, in your opinion that is the grade next above the good medium Moyune, that is next below it? A. That is correct.

The Court: I think it may be received as a condensed statement of his testimony.

Paper marked Exhibit 12.

39

Exhibit No. 12.

SCHEDULE OF COUNTRY GREEN TEAS ARRANGED IN ORDER OF QUALITY.

1	Choicest Moyune				
2	Choice Moyune	Choicest Teenkai			
3	Finest Moyune	Choice Teenkai			
4	Fine to Finest Moyune	Finest Teenkai			
5	Fine Moyune	Fine to Finest Teenkai			
6	On Fine Moyune	Fine Teenkai			
7	Fully Good Medium Moyune	On Fine Teenkai			
8	Good Medium Moyune	Fully Good Medium Teenkai	Finest Fychow		
9	On Good Medium Moyune	Good Medium Teenkai	Fine "		
10	Fair Moyune	On Good Teenkai	Good Medium Fychow	Finest Wenchow	
11	Good Common Moyune	Fair Teenkai	Fair "	Fine "	
12	Common Moyune	Good Common Moyune	Good Common "	Good Med. "	Good, clean, genuine Shanghai packed.
13		Common Teenkai	Common	Fair "	
14				Good Common	
15				Common "	
16					Mixed, Shanghai packed.
17					Common, refired and adulterated Shanghai packed.

It is agreed that a certain prescribed quantity of 43
physical tea was made the standard of Country Green Tea for the year 1901 by the selection of the Board of Tea Experts, and approval of the Secretary of the Treasury and that if "quality" means taste and flavor, the plaintiff's importations involved in the present case were not up to the standard No. 7 Country Green Tea established by the Secretary.

The Treasury Department Circular No. 35 of March 31, 1901, purporting to contain the law and regulations governing the importation and inspection of tea for said year, including a list of tea standards for said year and signed by O. L. Spaulding, Assistant Secretary, was put in evidence by Mr. Bishop. It is agreed that this document, being one of which 44
the Court may take judicial notice, need not be printed in the bill of exceptions, but may be referred to by either party upon the argument.

The following paragraphs, however, are inserted for convenience:

VIII.—No teas found on final examination to be unlawful importations under this act shall be released from bond except for the purpose of immediate exportation, or for destruction, as the case may be.

XI.—The examination of tea by examiners or boards of United States general appraisers under this act shall be made according to the usages and 45
customs of the tea trade, including the testing of an infusion in boiling water, and, if necessary, chemical analysis.

XIX.—The following are the standards selected by the board of tea experts, which are hereby fixed and established as standards under this act for the year 1901:.

No. 1. Formosa Ooloong.
No. 2. Foochow Ooloong.
No. 3. North China Congou.

46 No. 4. South China Congou.
No. 5. India tea (use for Ceylon tea).
No. 6. Pingsuey green tea.
No. 7. Country green tea.
No. 8. Japan pan tea fired (use for sun dried).
No. 9. Japan tea basket fired.
No. 10. Japan tea dust or fannings.
No. 11. Capers (use for scented Orange Pekoe).
No. 12. Canton Ooloong tea (*a*).
No. 13. Scented Canton tea (*a*).

COMPARISON WITH STANDARDS.

47 XX.—In comparing with standards, examiners are to test all the teas on these points, namely: For quality, for any foreign matter on the surface of the infusion, sometimes called scum, and for quality of infusion. Quality shall be ascertained by drawing according to the custom of the tea trade with the weight of a half dime to the cup. The quality must be equal to standard, but the flavor may be that of a different district as long as it is equal in sweetness. As an illustration, a Teenkai may be equal to a Moyune, but a distinctly smoky or rank Fychow, or Wenchow of sour character, must not be considered as equal to the two first mentioned.

48 XXI.—In order to test for floating coloring matter or scum, and also for the quality of infusion, a second drawing should be made of double the foregoing weight. Before disturbing the infusion examination should be made for any floating substance, and after pouring off the water the infused leaf should be taken out so as to exhibit the lower side which rested against the cup. Should the mass show a larger quantity of exhausted or decayed leaf or foreign substance than the standard, it shall be considered inferior in quality, and the tea must be rejected. In Greens and Japans particularly the brightness of the leaf should be considered as an evidence of quality.

XXII.—Should a tea prove, on examination, to be inferior to the standard in any one of the requisites, namely, quality, scum, or quality of infusion, it shall be rejected, notwithstanding that it be superior to the standard in some of the qualifications. No consideration shall be given to the appearance or so-called style of the dry leaf.

XXIX.—In all cases of rejections by examiners, the importer should be notified of the reason for rejection—that is, whether it be on the ground of quality, character of infusion, dust, scum, or admixture with foreign substance.

Q. (By Mr. Bishop.) Referring to this schedule, Exhibit No. 12, will you state what grade of teas the standard No. 7 for the year 1901 was as to quality? A. The quality of standard No. 7 was that of finest Teenkai.

Q. As shown upon that schedule No. 12? A. In this schedule No. 12.

Q. Are you familiar with the grades or properties of teas shown upon that schedule below, No. 5? A. I am.

Q. State whether or not those grades, any of them, and if so, which are pure and wholesome and free from adulteration. A. All the qualities specified, numberin, from No. 6 to No. 15, are pure and wholesome and fit for consumption and free from adulteration.

Q. And they have been ordinary subjects of commerce? A. Always in my recollection.

Q. Were they admissible under the standard fixed by the Secretary of the Treasury previous to 1901? A. Most of them.

Q. Now, referring to the teas shown upon Exhibits 3, 6, 7 and 8, which are the teas in controversy in this case; have you examined those teas? A. I have.

Q. Will you state whether they are or are not pure? A. They are all pure.

52 Q. Are they genuine tea leaves? A. In my opinion they are all genuine tea leaves.

Q. Are they wholesome and fit for consumption? A. Certainly, sir.

Q. Is there anything about these teas which render them unsuitable for articles of food? A. Not in my opinion.

Q. Are Ping Suey teas green teas? A. They are.

Q. How does the standard for Ping Suey teas for 1901 compare with the standard for country green teas of that year? A. Very much inferior in quality.

Q. And how do the teas shown upon Exhibits Nos. 3, 6, 7 and 8, compare in quality with the standard for Ping Suey of 1901? A. They are all
53 superior in quality.

Q. Now, referring to the teas on Exhibits 3, 6, 7 and 8, can you state whether those teas were admissible under the standard previous to 1901? A. In my opinion they were all equal to the standard established previous to March, 1901.

Q. And are they equal to the standard now in operation; that is the standard for 1902? A. They are.

Q. And admissible under that standard? A. In my opinion.

Q. Have any of these teas of the same class which were rejected in 1901, been admitted under the standard of 1902, to your personal knowledge? A.
54 Yes, sir.

All this line of testimony was taken subject to defendant's objection on the following grounds, namely: that Act of 1897 authorizes the board to establish standards which take into consideration not only purity and wholesomeness but also quality, meaning thereby the attributes that are tested by the senses of smell and taste; that the standard, having been selected by Government officials appointed by Congress for that purpose, is conclusive and cannot be reviewed in any Court, and therefore

it is entirely immaterial to go into any question of dispute as to whether or not any particular grade of tea, as recognized by the tea trade, was admitted or excluded; and that it is not claimed in the complaint that any error was made by the examiner of teas or by the board of appraisers in their comparison with the standard.

Q. I show you notices from the United States Customs Service Collector's office, and ask you whether these were received by you? A. They were.

Offered in evidence and marked Exhibits 13, 14 and 15.

These exhibits are upon a printed form headed "Notice of Condemnation of Tea"; are signed by John D. Terry, Deputy Collector, addressed to W. J. Buttfield, 106 Wall street, identifying the teas therein referred to (being the teas imported on the steamers *Ataka*, *Glengyle*, *Adana* and *Satsuma*, and rejected as aforesaid) by marks and numbers, it is upon the following form:

Entry No.....
Ship ....

Notice of Condemnation of Tea.

UNITED STATES CUSTOMS SERVICE,

PORT OF NEW YORK,

COLLECTOR'S OFFICE, ..., 189 .

To.....

.....

.....

.....lot of tea from.....
covered by invoice No. ....., entered by you on
..... has been condemned by the United

States "EXAMINER" of tea for the district, in accordance with law.

If you dispute the action of said "Examiner," and desire a review of such return by a Board of three General Appraisers, it will be necessary for you to notify me thereof, within ten days from this date, as provided in Department Regulations of April 21, 1897.

Deputy Collector.

Annexed thereto are notices signed by the Collector or by a Special Deputy Collector of which the following is a sample, the invoices and entry numbers being stated:

CUSTOMS SERVICE,
OFFICE OF THE COLLECTOR,
New York, N. Y.

FEBRUARY 18, 1902.

W. J. BUTTFIELD, Esq.,
87 Front St., New York.

SIR:

In accordance with the provisions of Section 8 of the Act of March 2, 1897, I transmit herewith two copies of the findings of the Board of General Appraisers, on the tea covered by your invoices Nos. 9677 and 9680, covered by entry No. 8016.

G. R. BIDWELL,
Collector.

Two enclosures.

Annexed thereto are copies of the rulings of the Board of General Appraisers on the form shown in Exhibit 9, signed in some instances by two, and in some instances by three members of the Board.

Q. What disposition was made by you of the teas shown on Exhibits 3, 6, 7 and 8? A. Final disposition?

Q. Yes. A. They were sold for export, or ex- 61
ported abroad.

Q. What was the occasion of your exporting them? A. For the reason that we were not permitted to—for the reason we were not allowed to withdraw them for consumption, and unless we exported the teas or sold them for export within six months, the teas would be destroyed.

The above question was objected to by plaintiff and a motion made to strike out the answer as asking for and stating a conclusion of the witness.

Q. Were those teas at all times after their arrival in this country, in a bonded warehouse? A. They 62
were, except in transit from the steamer to the bonded warehouse.

Q. And were they received on a permit to land similar to this Exhibit 11? A. On arrival of the steamer we received a permit from the Collector permitting us to store them in a bonded specified warehouse.

Mr. Bishop: I call upon you to produce two letters.

Mr. Whitney: Here is the only one we have received. There is no trace of any other.

Mr. Bishop: I offer in evidence a communication to the defendant from the plaintiff under date of March 13, 1902. 63

Marked Exhibit 16.

Said letter is as follows:

32

64 **Exhibit No. 16.**

FIRM OF W. J. BUTTFIELD

Successors to F. C. JENNINGS & Co.

106 Wall Street.

NEW YORK, March 13th, 1902.

Hon. GEORGE R. BIDWELL,
N. Y. City.

DEAR SIR:—

We beg to confirm our letter of February 25th,
65 1902.

Referring to your various communications advising us of the rejections of certain Teas covered by invoices and entries, as follows:

INVOICE	ENTRY
16956	13326
16964	13326
16950	13326
16954	13326
16918	13325
16968	13326
16966	13326
16961	13326

66 we protest against your refusing to admit for consumption in this Country the teas in question, on the ground that your action in so doing is illegal. We hereby notify you that we shall hold you personally liable for all damages that may be caused by said illegal acts on your part.

Yours respectfully,

W. J. BUTTFIELD.

The Court: Is there any question about the protest being regular?

Mr. Whitney: There is no question of a protest.

This is an action in tort and not an action in assumpsit. 67

It is admitted on the part of the defendant that the plaintiff's proceedings at the Custom House were regular from the time of the entry in this port until the time of the filing of the General Appraisers' report.

Q. (By the Court.) If you had sold this tea in the port of New York, how much would you have received for it? A. I have got the difference between what the teas were worth, the value of the teas in New York at the time of rejection, and what they realized. The total difference is $2,281.19; difference between New York value at the date of rejection and the prices realized, less freight, landing charges and selling commissions. 68

Mr. Bishop: Now, I offer in evidence a copy of a letter addressed to the defendant by the plaintiff, dated February 25, 1902.

Marked Exhibit 17.

69

34

70

Exhibit No. 17.

(Copy)

FEB. 25TH, 1902.

HON. GEORGE R. BIDWELL,
N. Y. City.

DEAR SIR:—

Referring to your various communications advising us of the rejections of certain Teas covered by invoices and entries as follows:

INVOICE	ENTRY
21408	182851
6091	192520
109	208081
23844	207944
23845	207944
22369	206116
23843	207944
23847	207944
23846	207944
22362	206116
22363	206116
22371	206116
9677	8016
9680	8016

71

72 we protest against your refusing to admit for consumption in this Country the teas in question, on the ground that your action in so doing is illegal. We hereby notify you that we shall hold you personally liable for all damages that may be caused by said illegal acts on your part.

Yours respectfully,

(Sgd.) W. J. BUTTFIELD.

CROSS-EXAMINATION BY MR. WHITNEY: 73

Q. I understand, Mr. Buttfield, that you got from the Collector, or rather the special Deputy Collector, a series of notices in the form of Exhibit 13, to which were appended copies of the ruling of the Board of General Appraisers. Is that so? A. We received notices signed by the special Deputy-Collector and also by the Collector.

Q. Being the notice in the form of Exhibit 13? A. Notice is dated January 11, 1902, from the customs service.

Q. If you look on the first page you will find that is Exhibit 13? A. Yes, sir.

Q. Now, the next thing that happened after the receipt of this notice was that you sold the goods for 74
export. Is that so? A. Yes, or we exported them ourselves.

Q. On the receipt of these notices you wrote these two letters of protest, Exhibits 16 and 17, and either exported the goods out of the country or else sold them to somebody else to export out of the country? A. That is correct.

Q. Won't you explain the reasons why you did that; you mean that having read the law and the regulations, and taken advice on them, you concluded that was the only thing practical for you to do? A. We knew from experience that was the only practicable thing to do.

Q. Now, you have stated that there were five 75
kinds of country green tea, Moyune, Teenkai, Fychow, Wenchow and Shanghai packed. Which kind of country green tea was it that you brought over on the steamer *Glengyle*? A. Some of them were Teenkais, some Moyunes and some Fychows.

Q. Were the other teas that you have spoken of, the *Ataka Satsuma* and *Adana*, teas distributed in about the same general way between the different kinds of country green teas? A. They graded from good Teenkais to fine Moyunes, ranged in the order of this schedule, marked Exhibit 12.

76 Q. Have you got a statement there showing what you claim to have been the grade of each one of these? A. I have.

Q. Then you state that in your opinion the various packages of tea that form the subject of your action here are ordinarily described as the grade and kind in this paper which you have handed to me? A. Various packages of tea which I have testified to are described.

Mr. Whitney: I will ask to have that marked in lieu of asking him the questions.

Marked Exhibit 18.

77

Exhibit No. 18.

692 Packages Ex S. S. "ATAKA."

A (in heart)	1/2	62	H/c		
B (in diamond)	1	28	"		
C (in triangle)	1	23	"		
D (in square)	1	40	"		
E (in star)	1	26	"		
F (in circle)	1	37	"		
G G (in double diamond)	1	33	"		
78 H H (in double heart)	1	24	"		
I I (in double triangle)	1/2	66	"		
J J (in double circle)	1	47	"		
K (in heart)	1	43	"		
W B M (in crescent)	13	16	"	3d Hyson	Good Teenkai
S F (in triangle)	5/6	24	"	3d Y. H.	Fully Good Moyune.
M M (in diamond)	6	52	"	4th Y. H.	Good Teenkai

79

A Q C (in triangle)	6	33	"	Good Style 2nd Y. H. Fine Teenkai
"	7	36	"	3d Y. H. "
"	8	15	"	3d Hyson "
K H M (in heart)	1	10 Cas.		Extra Gunpowder Fine Fychow Suspicion of smokiness.
"	2	25 H/c		1st Gunpowder
"	3	12	"	1st Imperial
"	4	10 Cas.		Extra Young Hyson
"	5	30 H/c		Clean 4th Young Hyson

80

583 Packages Ex S. S. "GLENGYLE"

Y Y X (in heart)	6	43 H/c		Good 3d Y. H. Good Teenkai
DYF (in diamond)	7	51	"	Good 3d Y. H. Fine Fychow
"	8	23	"	3d Hyson Fine Fychow
W B T (in crescent)	28	29	"	Good 3d Young Hyson Fine Fychow
"	29	19	"	Hyson Good 3d Fine Fychow
SHM (in diamond)	4	32	"	3d Young Hyson Fine Fychow

81

J (in diamond)	1	40	"	
Q K (K in heart)	1	50	"	Good Clean 3d Y. H.
L (in circle)	1	38	"	Fully Good Teenkai
T T C (in heart)	5/6	50	"	2nd Y. H. Fully Good Moyune
	7	19	"	Good 3d Hyson Fully Good Moyune

82	T H T (In heart)	5	23	"	Good 2nd Young Hyson Fully Good Soey Oan.
	YLM (In diamond)	6	18	"	3d Hyson On Good Moyune
	YTT (In square)	4	36	"	3d Young Hyson Fine Fychow
	T T H (In triangle)	1	8	Cas.	Extra Gunpowder Fine Fychow Little Smoky
	"	2	18	"	1st Gunpowder Fine Fychow
	"	4	44	H/c	3d Y. H. Fine Fychow
83	K H T (In heart)	4	47	"	3d Y. H. Good Teenkai

189 Packages Ex S. S. "SATSUMA"

	Y T T Y (In cross)	5	30	H/c	Good 2nd Y. H. Good Taenkai.
	"	6	33	"	3d Y. H. Good Teenkai
	YYM (In diamond)	3	22	"	3d " Fully Good Teenkai
	E S M (In heart)	5	28	"	3d Y. H. Fully Good Teenkai
84	S K T (In triangle)	6	24	"	Good 2nd Y. H. Fully Good Teenkai
	P D T (In heart)	5/6	52		3d Y. H. On Good Teenkai

258 Packages Ex S. S. "ADANA"

	M M YTE (YTE in triangle)	7	9	H/c	4th Y. H. Fine Moyune.
	H H T (In heart)	6	40	"	Good 3d Y. H. Fine Teenkai

T CKM (CKM in diamond)	6	28	"	3d " On " "
HSM	5	28	"	" " " " "
M H C (M in diamond)	2	8	"	Well Made 1st Gunpowder Good Teenkai
"	4	15	"	3d Y. H. Good Teenkai
Y L T (in heart)	4	6	"	3d Imperial Fine Teenkai
"	6	40	"	Good 3d Y. H. "
"	7	21	"	3d Hyson "
T F N (in triangle)	3	6	"	1st Imperial Good Teenkai
"	5	20	"	1st Y. H. "
"	6	37	"	3d Y. H.

86

Q. (By Mr. Bishop,) Did you at any time receive a permit releasing any of the teas shown in these Exhibits 3, 6, 7 and 8? A. No.

ELMSLIE M. GILLET, being duly sworn, on behalf of the plaintiff, testified as follows:

EXAMINED BY MR. BISHOP:

Q. Mr. Gillet, where do you reside? A. 137 East Forty-fourth street.

87

Q. What is your business? A. I am a tea broker.

Q. What is your firm? A. James and John R. Montgomery.

Q. How long have you been engaged in that business? A. Thirty-four years about.

Q. You are familiar with the grades and qualities of teas which are brought to this port and sold in this market? A. I am.

Q. And which are imported? A. Yes.

Q. I show you this paper marked Plaintiff's Exhibit 12, and which purports to be a schedule of country green teas, ranged in order of qualities from

88 the highest to the lowest, and I ask you whether that is a correct and accurate classification of such teas?

Mr. Whitney: The testimony of this witness is subject to the same objections as made to the testimony of Mr. Buttfield.

The Court: Yes.

A. This seems to be a schedule in perpendicular columns representing districts, and horizontal lines equal grades.

Q. Are you familiar with the standard No. 7 of country green teas for the year 1901? A. I am.

Q. Will you please state what the quality of that
89 standard was as compared with the classification of teas shown on Exhibit 12? A. The finest Teenkai.

Q. Do you observe a line drawn across that paper, Exhibit 12? A. Yes, sir.

Q. Does that correctly state the place of the grades of the quality of the standard No. 7? A. It does.

Q. (By the Court.) You mean by that all above that were admitted and all below it were excluded? A. All above were above the standard and all below should be excluded. I cannot say all were. All below the line under that standard should be excluded under the standard of 1901.

Q. (By Mr. Bishop.) Now, what have you to say
90 in regard to the classifications below that line as to their purity and freedom from adulterations and wholesomeness and fitness for consumption? A. I have seen teas of all these grades that were perfectly fit for consumption, down to common Wenchow, and I have seen common Wenchows that were fit.

Q. Is there anything in the classification of these teas below No. 5 which would probably or presumably show that they were unfit for consumption, and if so, which of those classifications? A. Well, the only ones that of necessity would be unfit for consumption would be mixed Shanghai packed, common refired and adulterated Shanghai packed.

Q. Are those the classifications below the second line? A. Yes, those are below the second line.

Q. What have you to say about the classifications above the second line, between the second and the first line? A. In what respect.

Q. In respect to whether there was anything in the classification which would indicate that they were probably unfit for consumption? A. No, sir? as I have already stated I have seen common Wenchows that were fit for consumption.

Q. How about the grades above that? A. Above that they are all right.

Q. When you say "all right," what do you mean? A. I mean that they are perfectly fit for consumption; pure teas.

Q. Pure teas and proper articles of food? A. Proper articles of food.

Q. Have you made an expert examination of the teas shown upon these Exhibits 3, 6, 7 and 8? A. I could not tell from this whether I have or not.

Q. Take your own memorandum, if you have it (paper shown witness marked Exhibit 19).

Exhibit No. 19.

Y Y X (in heart)	6	43 H/c Y. H.	ex SS. "Glengyle"	Good Teenkai
DYF (in diamond)	7	51 H/c Y. H.	"	Fine Fychow
	8	23 H/c Hysons	"	
W B T (in crescent)	28	29 H/c Y. H.	"	G M Teenkai
	29	19 H/c Hyson	"	
SHM (in diamond)	4	32 H/c Y. H.	"	Fine Fychow
J (in diamond)	4	40 H/c Y. H.	"	
Q K (K in heart)	1	50 H/c Y. H.	"	G M Teenkai
L (in circle)	1	38 H/c Y. H.	"	

94	T T C (in heart)	5/6	50	H/c Y. H.	"	O G "
		7	19	H/c Hyson	"	
	T H T (in heart)	5	23	H/c Y. H.	"	Fully Good Soeyoan.
	YLM (in diamond)	6	18	H/c Hysons	"	O G M Mo.
	A (in heart)	1/2	62	H/c Y. H.	ex SS. "Ataka"	
	B (in diamond)	1	28	H/c Y. H.	"	
	C (in triangle)	1	23	H/c Y. H.	"	
	D (in square)	1	40	H/c Y. H.	"	
95	E (in star)	1	26	H/c Y. H.	"	
	F (in circle)	1	37	H/c Y. H.	"	G M Teenkai
	G G (in double diamond)	1	33	H/c Y. H.	"	
	H H (in double heart)	1	24	H/c Y. H.	"	
	I I (in double triangle)	1/2	66	H/c Y. H.	"	
	J J (in double circle)	1	47	H/c Y. H.	"	
	K (in heart)	1	43	H/c Y. H.	"	
	W B M (in crescent)	13	16	H/c Hyson	"	G M Teenkai
96	S F (in triangle)	5/6	24	H/c Y. H.	"	O G "
	M M (in diamond)	6	52	H/c Y. H.	"	G "
	A Q C (in triangle)	6	33	H/c Y. H.	"	F G M "
		7	36	H/c Y. H.	"	
		8	15	H/c Hyson	"	
			605			
	YTT (in square)	4	36	H/c Y. H.	ex SS. "Glengyle"	Fine Fychow
	T T H (in triangle)	1	8	Cas. Gunpdr.	"	

	2	13	Cas. Gunpdr.	"	F G M	Teenkai
	4	44	H/c Y. H.	"		
K H T (in heart)	4	47	H/c Y. H.	"	G M	"
K H M (in heart)	1	10	Cas. Gunpdr.	ex SS. "Ataka"		
	2	25	H/c Gunpdr.	"		
	3	12	H/c Impl.	"		Fine Fychow
	4	10	Cas. F. Mee	"		
	5	30	H/c Y. H.	"		
		87				
Y T T Y (in cross)	5	30	H/c Y. H.	ex SS. "Satsuma"	F G	Teenkai
	6	33	H/c "		"	"
YYM (in diamond)	3	22	H/c "		F G	"
E S M (in heart)	5	28	H/c "		F G	"
SKT (in triangle)	6	24	H/c "		O F	
P D T (in heart)	5/6	52	H/c "			
		189				
M N YTE (YTE in triangle)	7	9	H/c Y. H.	ex SS. "Adana"	F G M	Moyune
H H T (in heart)	6	40	H/c "	"	Fine	Teenkai
T CKM (CKM in diamond)	6	28	H/c "		O Fine	Teenkai
HSM	5	28	H/c "	"	" "	"
M A C (M in diamond)	2	8	H/c Gunpdr.	"	G M	"
	4	15	H/c Y. H.	"		
Y L T (in heart)	4	6	H/c Impl.	"		
	6	40	H/c Y. H.	"	F G M	"
	7	21	H/c Hyson	"		
T F N (in triangle)	3	6	H/c Impl.	"	G M	"
	5	20	H/c Y. H.	"		
	6	37	H/c Y. H.	"		

100 Q. Now, I ask you whether you have made a careful examination of the teas shown on Exhibit 19; specimens of the actual teas? A. I have examined all these teas, sir, on this paper.

Q. When you say you have examined the teas, you mean you have examined samples of each of these teas? A. Yes, sir.

Q. How did you examine them? A. Weighed them up, put them in a cup, put boiling water on them, took a spoon and smelled them and also tasted them.

Q. Ordinary method of testing teas? A. Yes, sir.

Q. Did you find that any of these teas was impure, and if so, which of them? A. No, sir; none
101 of them were impure.

Q. Did you find that any of these teas were unwholesome? A. No, sir.

Q. Or unfit for consumption? A. No, sir.

Q. Or in any way improper as articles of food? A. No; I should not call them so, sir. I have used better teas than some of them, but I do not think any of them could be called impure or unfit for consumption.

Q. What can you say about the general character of these teas? A. I can tell you the character of each one of them.

Q. I wish you would? A. Good Teenkai, fine Fychow —

102 Q. Have you marked upon the paper which you hold in your hand your expert judgment as to each of these teas? A. I have.

Q. I see on this the words G M, or letters G M, &c.? A. That is good Teenkai; fine Teenkai. G M is good medium. Sometimes we leave the medium out.

Q. What is O G? A. On good medium.

Q. And the letter G stands for what? A. Good.

Q. F G M? A. Fully good medium.

Q. F G? A. Fully good.

Q. O F? A. On fine.

Q. Taking these teas as a whole, Mr. Gillet,

would it be proper to classify them as fine teas? A. 103
No, sir.

Q. What classification would you give them as a whole? A. That is a difficult thing to say, Mr. Bishop, because there are various grades there. I can make a guess at about what the average grade of them would be.

Q. You mean by that the average grade as shown by Exhibit 12? A. Yes, on that schedule there.

Q. Suppose I put this question to you: What is the range of the teas; I mean from what highest point down to what lowest point?

Q. (By the Court.) What is the standard of comparison; what do you call the best teas? A. Choice.

Q. Fine is not the best? A. No. 104

Q. The highest grade is called choice? A. Yes, sir.

Q. What is the lowest grade called? A. Well, common.

Q. From choice to common? A. Yes, sir.

Q. What are the intermediate grades? A. There would be choice, finest, fine, good medium. These would be the big grades, and then there would be in betweens. They are all on that schedule.

Q. Those are the grades of the better class of goods? A. Grades of all kinds. We haven't put choicest, because there were few of the choicest. I think it starts with finest.

Q. Would this be a fair statement of the different 105
grades: First, choicest; second, choice; third, finest; fourth, fine; fifth, fine Moyune, on fine Moyune, fully good medium, good medium, on good medium, fair Moyune, good common, good Moyune? A. That is absolutely fair, sir. I know the column straight across it shows equal grades.

Q. (By Mr. Bishop.) Explain that a little more fully to the Court? A. No. 1 is choicest Moyune, and No. 2 choice Moyune, and against that choicest Teenkai, and coming further down, fine and finest Teenkai would be fine Moyune, and coming to No. 11 good common Moyune, the equivalent of that

106 would be fair Teenkai, and fair Fychow of fine Wenchow. Reading across that way it gives teas of equal quality.

Q. Between what grades do these teas, which are the subject of this action, range? A. From "fine Teenkai" down to "on good Teenkai." In other words from 6 to 10 on that schedule.

Q. That is the numerals on the side of Exhibit 12, arranged from 6 to 10? A. Yes, sir.

CROSS-EXAMINATION BY MR. WHITNEY:

Q. What were the tests you applied in examining these teas, Mr. Gillet; how did you examine them
107 to find out what they were in your opinion? A. In examining those teas, in the first place, a certain weight is put into a cup which is determined by a scale, boiling water placed on this, and we have alongside of them standards to determine the grades.

Q. Where did you get those standards. A. The standards used in this case were the Government standards. After you have graded teas a number of years you have a sort of a concept in your mind of what the fine and finest is, and if there is any doubt you compare them.

Q. Where did you get the standards? A. Out of tin cans, one marked Season 1901-2, country green,
108 and another marked Season 1901-2, Ping Suey, and another one marked Current season for the other two grades for Ping Suey and country green; had four standards.

Q. And those were the Government standards? A. Yes, sir.

Q. Then the Government standard is a certain amount of tea and it is furnished to you in a tea can? A. We get it in lead cases.

Q. Where do you get it? A. From McGay, as a rule, I believe.

Q. He is the Government examiner of teas at the port of New York? A. Yes, sir.

Q. Every year the Secretary of the Treasury in establishing a standard of tea, has to provide an amount of tea great enough to enable the whole trade to be supplied with samples of it, and also sufficient amount to enable a considerable amount of it to be sent to China and Japan? A. It is not necessary to supply the whole trade, because most of the determinations as to quality would be done in this city, so that comparatively few people would have to have that standard. It is not necessary for the whole trade throughout the country to have it. It is necessary for China to have it, and China does have it. 109

Q. It is necessary to have it in considerable amounts for Philadelphia, Chicago and San Francisco? A. Yes. 110

Q. And some other points of this country? A. Yes, sir.

Q. And also in Japan, China or Ceylon, as the case might be? A. Yes, sir.

Q. Do you know how much tea the Secretary has to provide for every year for his standard sample of country green tea? A. I do not.

Q. It is a pretty considerable amount, isn't it? A. The board of tea experts can tell you that.

Q. They are the best authorities on how much has to be provided? A. They have to buy it.

Q. They have to go out in the market and buy a certain amount? A. It is selected by them. 111

Q. And in order that the Secretary should be able to establish a uniform standard that can be worked practically, he has to go into the market and buy a quite considerable amount of some one grade of tea, does he not? A. Yes, sir.

Q. And that considerable amount which he buys must be pure and wholesome and of the same grade and quality? A. Yes, sir; he gets one lot for each; he don't get two or three different lots of tea, but one lot of tea for one standard.

Q. But it has got to be a large enough lot to per-

112 mit of circulation over this country and China or Japan? A. Yes, sir.

Q. How did you examine the tea to ascertain whether it was say of the lower grade which you call common, or next to the lower grade which you call good common? A. Only personal experience in the tea business.

Q. What examination did you make of it? A. Smelled and tasted of it in the cup.

Q. You used, then, what is called the cup test? A. Yes, sir.

Q. The cup test is by pouring into two cups boiling water, and pouring a little tea of the kind you want to examine into one of these cups, and putting
113 a little tea of some standard into the other cup? A. Yes, sir.

Q. And then compare the two together to see whether one tastes and smells as good as the other? A. Yes, sir.

Q. That is what is called the cup test? A. Yes, sir.

Q. How long in the trade have they had that cup test? A. I can only tell you how long I have had it; thirty-two years; thirty-four years. It was not regarded as anything new when I came into the business.

Q. What other tests did you use beside this test of infusion in boiling water? A. No other test but
114 that.

Q. You didn't make any microscopical analysis? A. I did not.

Q. Or chemical analysis? A. I did not.

Q. And you considered the test of taste and smell sufficient for your purposes? A. I did.

Q. (By Mr. Bishop). How did the standard for 1901 compare with the standard for the year 1900, I mean the standard of these country green teas? A. The standard for 1901-2 was very much better than that for the present year.

Q. How about the standard for the present year? 115
A. Very much inferior to that of 1901-2.

Q. What can you say as to the strength and quality of these teas which you examined; I mean by that their tea qualities; tea strength? A. I should not think that any one of them was at all weak in any way, if that is what you mean.

Q. Was there anything to indicate the presence of exhausted leaf? A. Nothing whatever, sir.

HENRY C. THORN, being duly sworn on behalf of the plaintiff, testified as follows:

EXAMINED BY MR. BISHOP:

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Q. Where do reside, Mr. Thorn? A. Brooklyn.

Q. Your business? A. Tea broker.

Q. What is the firm? A. Henry C. Thorn.

Q. How long have you been engaged in business as a tea broker? A. 12 years; in the tea business 22.

Q. Are you familiar with the different grades and qualities of teas? A. I am.

Q. Are you familiar with the qualities of country green teas? A. I am.

Q. I show you this paper, Exhibit 12; is that a correct and accurate classification of country green teas according to their qualities, arranged in order from the highest to the lowest, the highest being 1 and the lowest 17? A. It is.

Q. Are you familiar with the standard No. 7 fixed 117
by the regulation of March 21st, 1901? A. I am.

Q. State what quality the standard No. 7 was according to this classification shown by Exhibit 12? A. I make it the finest Teenkai, which is No. 4 on that classification.

Q. (By the Court.) What do you mean by that? A. On that classification as they have it?

Q. Standard No. 7? A. Equal to that grading there of No. 4.

Q. That assumes, doesn't it, that No. 7, a package of No. 7 coming into this country, you assume it

was what it purported to be. Could you tell the tea inside of that package was No. 7? A. Without examining it?

Q. Yes. A. No; nobody could. That is, if I understand your question.

Q. (By Mr. Bishop.) Now, if standard No. 7 were in force, would that exclude all the classes of teas from No. 5 down to No. 14 on that schedule? A. Yes, sir, it would exclude everything poorer than that.

Q. And would standard No. 7, if in force, exclude all Fychow and Wenchow teas? A. Yes.

Q. Are there Fychow and Wenchow teas which have been ordinary subjects of commerce and which are wholesome and suitable for consumption? A. There are a great many of them.

Q. How does the standard for country green teas No. 7, adopted by regulation of March 21, 1901, compare in quality with the standard for Ping Suey teas for the same year? A. For the same year?

Q. Yes. A. The standard No. 7 is very much higher than the Ping Suey standard.

Q. Have you examined the teas shown by schedules 3, 6, 7 and 8 which correspond with the teas shown on schedule which I now hand you? A. Yes, sir; I have examined them all.

Paper offered in evidence and taken subject to correction and marked Exhibit 20.

Exhibit No. 20.

Y Y X (in heart)	6	48	H/c Y. H.	ex SS. "Glengyle"	Fully Good T.
DYF (in diamond)	7	51	H/c Y. H.	"	
	8	23	H/c Hysons	"	Fine Fychow
W B T (in crescent)	28	29	H/c Y. H.	"	Good T.
	29	19	H/c Hyson	"	
SHM (in diamond)	4	32	H/c Y. H.	"	Fine Fychow

J (in diamond)	4	40/H/c	Y. H.	"	
A K (K in heart)	1	50	H/c Y. H.	"	Fully Good T.
L (in circle)	1	38	H/c Y. H.	"	
T T C (in heart)	5/6	50	H/c Y. H.	"	Good Moyune
	7	19	H/c Hyson	"	
T H T (in heart)	5	23	H/c Y. H.	"	do. T.
YLM (in diamond)	6	18	H/c Hysons	"	do. Moyune
A (in heart)	1/2	62	H/c Y. H.	ex SS. "Ataka"	
B (in diamond)	1	28	H/c Y. H.	"	
C (in triangle)	1	23	H/c Y. H.	"	
D (in square)	1	40	H/c Y. H.	"	
E (in star)	1	26	H/c Y. H.	"	Same as J
F (in circle)	1	37	H/c Y. H.	"	Fully good T.
GG (in double diamond)	1	33	H/c Y. H.	"	
HH (in double heart)	1	24	H/c Y. H.	"	
II (in double triangle)	1/2	66	H/c Y. H.	"	
JJ (in double circle)	1	47	H/c Y. H.	"	
K (in heart)	1	43	H/c Y. H.	"	
W B M (in crescent)	13	16	H/c Hyson	"	Good T.
SF (in triangle)	5/6	24	H/c Y. H.	"	do. Moyune
MM (in diamond)	6	52	H/c Y. H.	"	do. T.
A Q C (in triangle)	6	33	H/c Y. H.	"	
	7	36	H/c Y. H.	"	Fine T.
	8	15	H/c Hyson	"	
YTT (in square)	4	36	H/c Y. H.	ex SS. "Glengyle"	Finest Fychow
T T H (in triangle)	1	8	Cas. Gunpdr.	"	
	2	13	Cas. Gunpdr.	"	Fine Fychow.
	4	44	H/c Y. H.	"	

124	K H T (in heart)	4	47	H/c	Y. H.	"	Good T.
	K H M (in heart)	1	10	Cas.	Gunpdr. ex SS. " Ataka "		
		2	25	H/c	Gunpdr.	"	
		3	12	H/c	Impl.	"	Fine Fychow
		4	10	Cas.	F. Mec	"	
		5	30	H/c	Y. H.	"	
			87				
	M N YTE (YTE in triangle)	7	9	H/c	Y. H. ex SS. " Adana "		Fine Moyune
	H H T (in heart)	6	40	H/c	"	"	do. T.
125	T CKM (CKM in diamond)	6	28	H/c	"	"	do. do.
	HSM	5	28	H/c	"	"	do. do.
	M A C (M in diamond)	2	8	H/c	Gunpdr.	"	Good T.
		4	15	H/c	Y. H.	"	do. do.
	Y L T (in heart)	4	6	H/c	Impl.	"	Fine T.
		6	40	H/c	Y. H.	"	do. do.
		7	21	H/c	Hyson	"	do. do.
	T F N (in triangle)	3	6	H/c	Impl.	"	Good T.
		5	20	H/c	Y. H.	"	do. do.
		6	37	H/c	Y. H.	"	do. do.
126	Y T T Y (in cross)	5	30	H/c	Y. H. ex SS. " Satsuma "		F. T.
		6	33	H/c	"		do.
	YYM (in diamond)	3	22	H/c	"		F. T.
	E S M (in heart)	5	28	H/c	"		Fully Good T.
	SKT (in triangle)	6	24	H/c	"		do.
	P D T (in heart)	5/6	52	H/c	"		On Good T.
			189				

Q. This is the schedule which shows the teas which 127
you examined, Exhibit 20? A. Yes, sir.

Q. You examined a sample of each of these lots? A. Every one; I put how I made them there on the right-hand side.

Q. Did you mark against each of the lots upon your list, Exhibit 20, the quality of the teas as you found them? A. I wrote the character that I made it and quality.

Q. State whether you found those teas to be more deleterious to health than other kinds of teas? A. Not in the slightest.

Q. Were they pure and free from adulteration? A. Absolutely.

Q. Were they genuine and free from spurious and 128
exhausted leaves? A. They were.

Q. Was there anything in any of these teas that indicated or suggested that they were presumably impure, unwholesome or unfit for consumption? A. There was not.

Q. How did they compare in quality with the Ping Suey standard established in 1901? A. All very much better.

Q. What was the range of the qualities of the teas shown on Exhibits 3, 6, 7 and 8 and your Exhibit 20, according to the classification on the Exhibit No. 12 that you have in your hand; running from what number to what number? A. I think I went down to 9, running from 6 to 9. I did not make anything 129
lower than a fine Fychow. I graded them from 6 to 9 on this.

Q. You graded them all from what classification; just call off? A. I graded them from fine Moyune, fully good medium Moyune, good Moyune, fine Teenkai, good Teenkai, good medium Teenkai and fine Fychow.

Q. Have the articles classified upon Exhibit 12 from 5 down to 14, been heretofore ordinary articles of commerce? A. Always.

Q. Were they largely dealt in previous to 1901? A. They were.

180 Q. Were you familiar with all the standards fixed by the Secretary of the Treasury on March 21, 1901? A. I was.

Q. Was each of those standards uniform with the other standards in quality as shown by taste and flavor? A. In my opinion they were not.

CROSS-EXAMINATION BY MR. WHITNEY:

Q. Mr. Thorn, how did you make this examination to find out whether those teas were wholesome? A. Simply by smelling and tasting.

Q. Are you a physician? A. No, I am not.

Q. You did not make any microscopic examination? A. Of what?

131 Q. Of any of these teas? A. I have never made any examination in that way of teas in my life.

Q. And you did not make any chemical analysis? A. No, I did not?

Q. A package, as referred to by Mr. Bishop, I suppose, is the same thing as what is called a half chest, isn't it? A. Well, half chest or box, original package coming from China or Japan.

Q. It is called a half chest? A. Some call it half chest and some boxes, depending on the size of the package and the district it comes from.

Q. Is the quality of the tea always uniform in the same box? A. It is supposed to be, yes.

Q. What is a chop? A. Well, it is several lines
132 of different grades all put in together.

Q. In each importation of tea of say fine Teenkai tea, there is usually a variety of qualities of fine Teenkai tea, is there not? A. No, I don't agree with you in regard to qualities. There is a difference in valuation.

Q. Why do different portions of the same chop differ in valuation? A. Because they are made up from teas of the very large leaf and the lower valued leaf, up to a very small leaf that makes the best teas.

Q. You call them the same quality? Q. They are supposed to be, as near as you can get.

Q. Nevertheless, some are more valuable than 133
others? A. Certainly.

Q. That is because they taste better? A. Not necessarily.

Q. Because they are stronger? A. I would hardly put it in that way.

Q. What is a gunpowder tea? A. It is a very small, rolled tea.

Q. The gunpowder tea is made from smaller leaves, or cut from the top of the tea plant? A. That is what I understand. You will have to ask somebody that knows more about China than I do.

Q. A chop of fine Teenkai tea would presumably have some gunpowder in it? A. Oh, yes.

Q. And in March, 1901, about how much would 134
that have been worth? A. That I could not tell you without getting my book; that was because there is a very large range in value. Gunpowder teas of a Teenkai chop might be worth 22 cents and might be worth 65, depending entirely on what kind of gunpowder tea it was.

Q. The same chop would have some Hyson tea in it, too? A. Probably.

Q. What is a Hyson tea? A. Depends on what the Hyson is. Sometimes a Hyson is a very valuable tea, not as high priced as some of the others.

Q. When the same chop has some gunpowder and some Hyson, the Hyson is very much inferior to the gunpowder? A. Not always. Usually, but once in 135
a while we get a very fine Hyson tea and a very poor gunpowder in the same chop.

Q. It is common for a gunpowder tea to be worth three times as much as Hyson? A. No; if you take an extra gunpowder it would be, but take a third gunpowder it would be worth very little more than the Hyson.

Q. Sometimes the Hyson would be worth 10 cents and the gunpowder might be worth about 30 cents? A. That could happen.

Q. In your statement here of Mr. Buttfield's teas, stating that they were fine Teenkai, or fine Fychow,

136 or whatever they might be, have you got it stated there how much of it was gunpowder and how much of it was Hyson? A. No; I simply looked at the samples, and did not go into the grading; put down the characteristics of the teas.

Q. You call a difference between gunpowder and Hyson not a difference of quality but difference of grading? A. As much that as anything.

Q. And there are intermediate grades between the two, are there not? A. If you want to go into a chop of green teas there is usually 8 or 10 lines of different values. There are two or three gunpowders, five or six imperials, sometimes one and sometimes two Hysons, and it is impossible to say that it is between
137 this and that.

Q. Now, it is a fact, isn't it, that a Hyson of the fine Teenkai tea may not be any better than the gunpowder of a good medium Teenkai, or an "on good Teenkai" tea? A. That might be.

Q. So that we don't know when we are simply told that a certain lot of tea was fine Teenkai tea, whether it was very valuable tea or not; we have to find out further whether it was a gunpowder or a Hyson, don't we? A. Not as I understand it; when you are looking at teas in regard to the United States standard, that has nothing to do with the value or style. It is the cup quality, and that is what I looked into.

188 Q. And the cup quality of a gunpowder of No. 9 or 10 on this schedule of yours, may be just as good as the cup quality of a Hyson of No. 6? A. No, sir; that is not true.

Q. How would you correct that statement? A. Only in this way, that No. 9 a good medium Teenkai or good medium Moyune, I did not make equal to a fine Teenkai tea No. 6. I think you put it a little too strong.

Q. You would make a difference of about two grades instead of three? A. No; I think these grades here are accurate.

Q. I mean as comparing the Hyson of the higher

grade with the gunpowder of the lower grade? A. 139
I should think that would be about it, three to four grades.

Q. Three or four grades? A. Three or four grades.

Q. Then if you took for the standard the Hyson of a fine Teenkai—a low Hyson of a fine Teenkai—that standard would let into the United States a large amount of tea of grades which you have placed lower here on your schedule? A. It would not let them in on cup quality. You want to know the difference in valuation.

Q. I am talking about the cup quality. A. The cup quality of fine Teenkai would not let in any Fychow, or good Teenkai.

Q. But the cup quality of a low grade of Hyson 140
of a fine Teenkai would let in the better grade of the good medium Teenkai, wouldn't they? A. It might possibly, because a better grade might draw better than the average of that chop.

Q. Did you have occasion in your business, when these standards were announced in March, 1901, to look at the standard of country green and see what it was? A. I did.

Q. What did you judge it to be when you looked at it then? A. I made it a very fancy Teenkai tea.

Q. You made it a fancy Teenkai tea? A. I did.

Q. I don't find that on your list? A. I make it here finest.

Q. You make it grade 4, finest? A. Yes, sir. 141

Q. Mr. Bishop seemed to be advised it was grade 5? A. I graded it 4.

Q. By what operation did you come to the conclusion that it was finest Teenkai? A. Simply smelling and tasting it.

Q. In an infusion in a cup of boiling water? A. Yes, sir; the regulation way; the only way.

Q. That is the ordinary cup test? A. That is the regular way.

Q. That is the cup test not only under this act, but it has been used for 40 years in the tea trade?

142 A. Ever since I have been in the tea trade they have used cups.

Q. Now, don't you know it was a Hyson which was adopted as a standard; you noticed that? A. Yes, certainly I did.

Q. And don't you know that was only worth at that time 10½ cents in the market? A. I don't remember the value of it.

Q. That was about what it was worth, wasn't it? A. That I could not say without looking up the record. I should imagine the tea was worth more than that, although it might have been, at that time, on account of the cup quality.

Q. And there were gunpowders of the same grade
143 as Teenkai tea, worth 30 cents a pound at that time? A. I presume there were.

Q. There is a regular season for buying tea, isn't there? A. You mean in China?

Q. Yes. A. Yes.

Q. When is the season? A. It starts in China about the latter part of May for green teas—no, I guess it starts the latter part of June.

Q. How long does it last? A. As long as there is any stuff there to buy.

Q. How long is the season, usually? A. It isn't quite closed yet this season. Some years they carry over stock until the next year.

Q. Usually it runs four or five months the long-
144 est? A. I should say it runs always six months. I may be mistaken in regard to the date of the opening.

Q. These standards are announced by the Secretary of the Treasury in March, so that the people can get them and send them to China or Japan for use in buying over there? A. That is the idea.

Q. And those teas that are bought over there by comparison with the standards in China or Japan are then imported here in the following winter, are they not? A. Oh, no; tea might be bought there the latter part of June and shipped and landed here in this country in August. It is only thirty days.

Q. It is imported from August to the end of the importing season? A. Yes, sir. 145

Q. And the following year the Secretary adopts new standards? A. Yes, sir.

Q. Now, during the time between the adoption of the standard and the average date of the importation of the teas, the tea adopted as the standard is expected to deteriorate somewhat, is it not? A. Depends on the tea entirely that they select.

Q. But that is usually so, that the standard that one would select, of tea, or any box of tea one would select, would in the course of the following year deteriorate somewhat? A. Suppose they selected a tea that is already a year old and has deteriorated all it is going to. 146

Q. Suppose they would select a standard of fresh tea? A. There would be a certain amount of deterioration.

Q. It would go down, if it was finest Teenkai, it would go down to fine Teenkai, wouldn't it? A. No, if it is finest Teenkai once it will always be finest Teenkai.

Q. It will be no better in cup quality than a new Teenkai next year? A. The finest Teenkai tea does not go off much, or a fine Teenkai.

Q. Do fine Teenkais go off? A. Not to any great extent; a low grade tea does.

Q. They all deteriorate somewhat? A. Yes.

Q. So some allowance has to be made for that? 147
A. There ought to be.

Q. Now, when the Secretary selects tea he has got to select a sufficient amount of tea of the same quality to enable it to be distributed to the various parts of this country and China and Japan? A. That is the idea.

Q. Therefore, he cannot get tea that is only represented by a few pounds in the market, but tea of which he can find a number of half chests in the market of uniform quality? A. Certainly, but he does not buy them.

Q. Do you know how much was necessary, in

148 1901, of the country green teas, or how much is considered necessary to obtain a uniform quality? A. No; but I know for two years I have not bought any of it for them. Up to that time every year I would buy one or two lots in small lots. I do not think I have bought over five packages in any one line and that is a small lot of tea.

Q. You have to get from five to ten packages at any rate? A. They may get ten, but even that is a small quantity.

Q. I suppose everybody in the trade knew, immediately after the selection of these standards, what grade they were, did they not? A. I suppose those interested who looked into it.

149 Q. So that those samples on being sent out to China, would apprise everybody in China that the Government, would not, during the following year, admit tea of a lower grade and quality than a Hyson of finest or fine Teenkai, whichever the standard may have been? A. No, sir; it is not a case of Hyson. They would not admit anything of a lower cup quality than that standard.

Q. Which standard happened to be a Hyson? A. Happened to be a Hyson tea.

REDIRECT-EXAMINATION BY MR. BISHOP:

Q. When you speak of grades of tea like gunpowder and Hyson and other such designations re-
150 ferred to by Mr. Whitney, are those names generally used in the tea trade to indicate the style and appearance of the tea? A. Certainly; that is what they are for.

Q. They have no reference to the cup quality of the tea, have they? A. Not in the slightest.

Q. A gunpowder tea is a tea – describe it? A. A gunpowder in a country green tea is a very small, round tea; the leaf is rolled and it is made out of the small leaf and there is three or four different styles, some made out of larger leaves, and the smaller they are the more they bring, and they bring it on account of the style of tea.

Q. That does not indicate it is any superior kind 151
of tea or quality of tea? A. Not the slightest.

Q. Simply it is secured from a more delicate leaf and rolled? A. Taken more manipulation and more time to make it.

Q. When you speak about the price of these teas and the price of the finest Teenkai, you refer to the teas in bond, do you? A. Well, yes, either in bond or out of bond.

Q. When the price is spoken of as being 10 cents or thereabouts? A. That is in bond.

Q. So when you speak of the price of the gunpowder tea being possibly 30 cents or some of the finest Teenkai, that is in bond? A. That is in bond.

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RECROSS-EXAMINATION BY MR. WHITNEY:

Q. If there is not any difference in cup quality, why would the gunpowder of the same chop of tea be worth say 30 cents and the Hyson worth 10 cents? A. I could answer that by asking a question, which I don't suppose would be correct.

Q. I would rather have a direct answer. Tell me your answer? A. It is a question that I think any tea man thoroughly understands, and I don't know as I can explain it thoroughly so that the gentlemen will understand it.

Q. Will you explain it? (Question read.) A. In the first place, I do not admit that the Hyson is only worth 10 against the gunpowder 30 in any 153
special chop. Going on the supposition that that is so, tea is handled like any other article of merchandise, and the appearance of the gunpowder is much better than the appearance of the Hyson, and that alone makes them much more valuable. Tea is only merchandise in the way it is handled and sold, and the appearance has a great deal to do with it, but it is sold at a valuation.

Q. Is not the taste of a gunpowder tea better than the taste of Hyson of the same chop? A. It might be and might not. You might get a fancy Hyson and poor gunpowder in the same chop.

154 Q. Don't you expect it to be? A. Naturally you expect it to be. At the same time I have seen a good many chops of tea where they had a better drawing Hyson in it than gunpowder.

Q. Ordinarily the gunpowder is much better than Hyson? A. Ordinarily the gunpowder brings more money than the Hyson.

Q. Tastes better? A. I don't know as it does.

Q. You had just as leave drink a Hyson as a gunpowder? A. I had as soon drink a fine Hyson as an ordinary gunpowder tea.

Q. Suppose you were buying a fine gunpowder tea, would you rather drink the gunpowder of it than the Hyson? A. Certainly I would if I was
155 buying the finest out of the chop.

Q. That is about the way a chop will come, isn't it (showing paper)? A. Yes, that is an ordinary chop of green tea.

Q. There is nothing out of the way in the sample I show you of valuations of the teas in a chop of green tea? A. Well, one chop of green tea does not make a standard for all chops of green tea.

Q. There is nothing unusual in it? A. No, there is nothing unusual in it.

Q. I have shown you a chop of importation of Moyune tea where 7 cases of gunpowder in the chop were worth 23 cents, and they run down through nine grades until the Hyson is worth 7½. Now,
156 there is nothing unusual in that? A. No, those are about the usual valuations.

Q. Then, isn't it important in ascertaining what was the real nature of a standard of tea selected by the Secretary of the Treasury to find out whether he selected a Hyson or gunpowder? A. No; he might have taken a fancy gunpowder off a chop that would not have the cup quality of this standard he selected.

Q. (By Mr. Bishop.) The tests which you used, were they the same as employed by the tea examiner in examining these—I mean this test by an in-

fused leaf with water? A. I suppose he examines 157
teas in that way.

Q. Do you know how the tea examiner tests the tea? A. I have never had the pleasure of being over there.

Q. (By Mr. Whitney.) There is no distinction between the way the tea examiner tests tea and the way anybody else tests tea? A. I have never been over there, but I understand over there they often draw double weight.

Q. They draw tea and have a standard and put a little tea from the standard in one cup and the other tea in another cup, pour boiling water on them and taste of them? A. I presume he tests them the same way as we do, with the exception, I under- 158
stand, they use double weight, which, of course, we do not use.

Q. (By Mr. Bishop.) In moistening the tea in that way and after the tea has been steamed in hot water, impurities, &c., are easily detected, are they not? A. Why, certainly. If there is anything impure in the tea it will show right out.

Q. And then after the tea has spread itself in the water you examine the tea leaf itself, do you? A. In taking the leaf up on a spoon to smell of it we naturally see the leaf, and if there is anything impure, any adulterated leaves, it would naturally show out.

The Court: It seems to me it is undoubtedly a 159
question of law upon this record, and I think that you, Mr. Bishop, have already sufficient evidence to warrant a direction of a verdict in your favor, provided you are correct upon the law question; that is, that this act is unconstitutional, and if it be constitutional and the Secretary has improperly excluded the teas, and if it is to be construed as you contend it is, then you have made a case. Otherwise you have not. Therefore it does not strike me as at all material to multiply the expert testimony. We want to get this record so that the question will be finally determined by the Supreme Court. I want

160 it perfectly clear that the plaintiff has made a case upon the facts, provided the law is with him.

Counsel for the defendant stipulates that Mr. Joseph H. Lester's evidence will be substantially similar to that already given by the witnesses, Gillet and Thorn.

A similar stipulation is made with reference to the testimony of Mr. William H. Decker, called for the plaintiff.

WILLIAM J. BUTTFIELD, RECALLED AND EXAMINED BY MR. BISHOP:

Q. Mr. Buttfield, you testified what the difference between what the teas were, the value of the teas in
161 New York at the time of the rejection, and what they realized, was $2,281.19. Was the amount realized, $2,281.19, less than the value of the teas at New York at the time of the rejection? A. It was.

Q. Can you state about what the annual importation of teas into the United States is? A. The average importation into the United States is approximately 90,000,000 pounds.

Q. What is the annual importation into the United States of country green teas? A. The average annual importation of country green teas is from six to eight million pounds.

Q. (By the Court.) Do you mean now? A. It has been in the past. I am taking now a period of say
162 ten years.

Q. During this particular time? A. It was very much less during that particular time.

Q. (By M. Bishop.) If the standard fixed by the regulations of March 21, 1901, for country green teas was enforced, what proportion of country green teas would be excluded? A. Two-thirds of the total crop of country green teas would be excluded under that standard of 1901.

CROSS-EXAMINTION BY MR. WHITNEY:

Q. When this standard was promulgated in March, 1901, you examined it, I suppose, to see

what it was? A. When we received the sample, 163
yes.

Q. You went and got a sample, didn't you, at once? A. Yes.

Q. And you found it to be a Hyson of a fine Teenkai tea, did you not? A. We found it to be a Hyson of the finest Teenkai tea.

Q. Of the finest Teenkai tea? A. Of the finest Teenkai tea,

Q. You have put it on your statement here, the finest No. 4, and you have drawn a line under No. 5? A. That is for the reason that the standard of the current season would admit probably one grade lower of the new season.

Q. On account of deterioration? A. Of the slight 164
deterioration that occurs.

Q. You have rated it, however, a Hyson of the finest Teenkai tea, then? A. That is correct.

Q. And don't you know that that lot was worth about 10½ cents a pound at that time and was bought at that rate by the Government? A. I do not know it, sir.

Q. It is true it was worth about 10½ cents a pound in bond? A. I cannot recall what the value of that tea was at that time, but for the past year the value of similar teas has been in the neighborhood——

Q. No matter about the past year; I am speaking about March, 1901? A. I cannot recall the exact market value at that time.

165

Q. Now, you sent out samples to China, as all the other importers did, with the knowledge that no tea inferior in cup quality to that standard would be permitted to be imported into the United States if the law was observed and it was constitutional? A. We did.

Q. (By Mr. Bishop.) Can you tell by reference to this paper or otherwise the value of the teas which were rejected, which are the subject of this suit, at the time of their rejection; that was about a year after the standard was fixed; the range of them?

166 A. The value of the teas in the New York market at the time of the rejection——

Q. What was the range in prices? A. Ranged from 12½ cents in bond to 26 cents in bond.

[PLAINTIFF RESTS.]

Mr. Whitney: I move for the direction of a verdict for the defendant on the ground, in the first place, that the act is constitutional and that it is for the Secretary to decide as to the standard which is to be adopted, which decision cannot be reviewed by
167 this Court in this action. And that there is no sufficient evidence that the Secretary of the Treasury has acted in any way improperly.

Also on the ground that assuming the act to be unconstitutional, or if it were assumed that the Secretary had acted improperly in the matter, no cause of action in tort is established against Mr. George R. Bidwell. There is no fact proved showing a conversion of the tea by him, or in any other way making him liable in such an action.

On both grounds I move for the direction of a verdict for the defendant.

The Court: The question has to be passed upon by the Supreme Court, and it can be passed upon now
168 in a more satisfactory way than to have the defendant go into his evidence in this case. You have a perfectly clear case now to present all of these questions.

Mr. Bishop: I would like to make sure that I have got my constitutional questions presented.

The Court: Move for the direction of a verdict.

Mr. Bishop: The plaintiff requests the Court to direct a verdict in favor of the plaintiff for damages proved upon the grounds:

FIRST.—That the action of the Secretary of the Treasury in fixing and establishing the standard No.

7 for country green teas by regulation promulgated March 21, 1901, was void and of no effect, and afforded no justification to the defendant in excluding the plaintiff's teas from import, because said act of the Secretary was an attempted exercise of legislative power to regulate commerce, which power, by the Constitution of the United States, is conferred upon Congress alone and cannot be delegated by it. 169

SECOND.—That the act of March 2, 1897, entitled "An Act to prevent the importation of impure and unwholsome tea," in so far as it authorized the Secretary of the Treasury to determine what teas could be imported into the United States by citizens thereof, is unconstitutional and void, because such power can be exercised only by Congress, and cannot be delegated by it to any other person or body. 170

THIRD.—That since the evidence shows that the teas offered by the plaintiff for import were genuine, pure and wholesome, free from adulteration, fraud and deception and fit for consumption, and had heretofore been and now are ordinary subjects of commerce, the act of the Secretary of the Treasury in fixing and establishing a standard by regulation dated March 21, 1901, which excluded said teas from import, was unlawful, and the act of March 2, 1897, in so far as it authorized the fixing and establishing of such standards by said Secretary, was in contravention of the Constitution of the United States, as depriving the plaintiff of his property and liberty without due process of law, and the said action of the Secretary of the Treasury afforded no justification to the defendant in rejecting said teas from import. 171

FOURTH.—That Congress has no authority under the Constitution of the United States to pass a law restraining the plaintiff, a citizen of the United States, from importing, selling or dealing in teas

172 which are ordinary subjects of commerce and which are not injurious to the public health, morals or welfare, and the act of March 2, 1897, in so far as it does prevent the plaintiff from importing, selling or dealing in such teas, is unconstitutional and void as depriving the plaintiff of his property and liberty without due process of law, and affords no justification to the defendant in excluding such of the plaintiff's teas in controversy as were ordinary subjects of commerce and were not injurious to the public health, morals or welfare.

FIFTH.—That Congress cannot lawfully enact a law preventing a citizen of the United States from
173 dealing in a wholesome article of food, unless the restraint imposed upon the citizen has some tendency to protect the public health, morals or welfare, and that the act of March 2, 1897, so far as the same authorized the Secretary of the Treasury to exclude teas merely on the ground of quality, based on taste and flavor, having no relation to nor indicative of anything deleterious or injurious to the health or prejudicial to the public welfare, is unconstitutional and void as being an encroachment, unauthorized by the Constitution, on the liberty of a citizen, and that the said act and the regulations adopted thereunder affords no protection to the defendant in rejecting the plaintiff's teas, upon the
174 ground of quality, based on taste and flavor, having no relation to nor indicative of anything deleterious or injurious to the health or prejudicial to the public welfare.

Now, I ask the Court to direct a verdict in favor of the plaintiff on the ground that it appears that the Secretary of the Treasury established the standard in question which excluded teas which were not of the lowest grade, neither demonstrably of inferior purity or unfit for consumption, or presumably or possibly so, because of their inferior quality; and that the teas offered for import as shown by plaintiff's witnesses, were not of the

lowest grade of tea, were not demonstrably of in- 175
ferior purity or unfit for consumption, or presumably or possibly so because of their inferior quality.

The Court: I think that covers every possible question in the case. The motion to direct a verdict for the plaintiff is denied.

Exception taken by counsel for the plaintiff.

The Court: The motion made by the defendant for the direction of a verdict is granted.

Exception taken by counsel for the plaintiff.

The Court: Gentlemen of the Jury: There is no question of fact in this case, and the law of the case 176
has already been determined, so far as this Court is concerned, adversely to the contention of the plaintiff. Under these circumstances there is nothing for the Court to do now but direct you to find a verdict in favor of the defendant.

The jury rendered a verdict in favor of the defendant.

Inasmuch as the proceedings, evidence, objections, instructions, rulings and exceptions contained in the foregoing bill do not appear on record in this cause, I, ALFRED C. COXE, a Judge of said Court, who presided at the trial of said cause, after due notice being given to the defendant in said cause, 177
have settled and signed said bill of exceptions and ordered that the same be made a part of the record in this cause this 3d day of March, 1903.

ALFRED C. COXE,
U. S. Circuit Judge.

Approved in form.
EDWARD B. WHITNEY,
Of Counsel for Defendant.

(Endorsed)—U. S. Circuit Court.—Filed April 27, 1903.—Southern District of New York.—John A. Shields, Clerk.

78 Supreme Court of the United States.

WILLIAM J. BUTTFIELD, Appellant,
against
GEORGE R. BIDWELL, Appellee.
} Assignments of Error on Appeal.

And now on this 23d day of December, 1902, comes the appellant William J. Buttfield, by James L. Bishop, Esquire, his attorney, and says that in the record and proceedings in the above entitled matter there is manifest error in this, to wit:

First. That the court erred in denying the motion made by the appellant to strike out the words "You can make such an offer, of course, to the collector to pay certain moneys, but we should not pass the withdrawal" in answer to the question "an offer to pay duty under such circumstances would be useless," in the testimony of John W. Ridsdale, appearing on page — of the transcript of the record.

Second. That the court erred in denying the motion made by the appellant herein, for the direction of a verdict in his favor for damages proved, for the reason that the action of the Secretary of the Treasury in fixing and establishing the standard No. 7 for country green teas by regulation promulgated March 21st, 1901, was void and of no effect, and afforded no justification to the defendant in excluding the plaintiff's teas from import, because said act of the

79 Secretary was an attempted exercise of legislative power to regulate commerce, which power by the Constitution of the United States, is conferred upon Congress alone and cannot be delegated by it.

Third. That the court erred in denying the motion made by the appellant herein, for the direction of a verdict in his favor for damages proved, for the reason, that the act of March 2d, 1897, entitled "An act to prevent the importation of impure and unwholesome tea" in so far as it authorized the Secretary of the Treasury to determine what teas could be imported into the United States by citizens thereof, is unconstitutional and void because such power can be exercised only by Congress, and cannot be delegated by it to any other person or body.

Fourth. That the court erred in denying the motion made by the appellant herein, for the direction of a verdict in his favor, for damages proved for the reason that, since the evidence shows that the teas offered by the plaintiff for import were genuine, pure and wholesome, free from adulteration, fraud and deception, and fit for consumption, and had heretofore been and now are ordinary subjects of commerce, the act of the Secretary of the Treasury in fixing and establishing a standard by regulation dated March 21st 1901, which excluded said teas from import, was unlawful, and the act of March 2d, 1897, in so far as it authorized the fixing and establishing of such standards by said Secretary, was in contravention of the Constitution of the United States, as depriving the plaintiff of his prop-

erty and liberty without due process of law, and the said
80 action of the Secretary of the Treasury afforded no justification to the defendant in rejecting said teas from import.

Fifth. That the court erred in denying the motion made by the appellant herein, for the direction of a verdict in his favor, for damages proved for the reason that Congress has no authority under the Constitution of the United States to pass a law restraining the plaintiff, a citizen of the United States, from importing, selling, or dealing in teas which are ordinary subjects of commerce and which are not injurious to the public health, morals or welfare, and the act of March 2d, 1897, in so far as it does prevent the plaintiff from importing, selling or dealing in such teas, is unconstitutional and void as depriving the plaintiff of his property and liberty, without due process of law, and affords no justification to the defendant in excluding such of the plaintiff's teas in controversy as were ordinary subjects of commerce and were not injurious to the public health, morals or welfare.

Sixth. That the court erred in denying the motion made by the appellant herein for the direction of a verdict in his favor, for damages proved for the reason that Congress cannot lawfully enact a law preventing a citizen of the United States from dealing in a wholesome article of food, unless the restraint imposed upon the citizen has some tendency to protect the public health, morals or welfare, and that the act of March 2d, 1897, so far as the same authorized the Secretary of the Treasury to exclude teas
81 merely on the ground of quality, based on taste and flavor, having no relation to nor indicative of anything deleterious or injurious to the health or prejudicial to the public welfare, is unconstitutional and void as being an encroachment, unauthorized by the Constitution, on the liberty of a citizen, and that the said act and the regulations adopted thereunder affords no protection to the defendant in rejecting the plaintiff's teas upon the ground of quality, based on taste and flavor, having no relation to nor indicative of anything deleterious or injurious to the health or prejudicial to the public welfare.

Seventh. That the court erred in denying the motion made by the appellant herein for the direction of a verdict in his favor for damages proved for the reason that it appears from the testimony introduced by the plaintiff that the Secretary of the Treasury established the standard in question, which excluded teas which were not of the lowest grade, neither demonstrably of inferior purity or unfit for consumption, or presumably or possibly so, because of their inferior quality; and that the teas offered for import, as shown by the plaintiff's witnesses, were not of the lowest grade of tea, were not demonstrably of inferior purity or unfit for consumption, or presumably or possibly so because of their inferior quality.

Eighth. That the court erred in granting the motion made by the appellee herein for the direction of a verdict in his favor.

Wherefore the said appellant prays that the judgment en-
82 tered herein in the circuit court of the United States for the southern district of New York, be reversed and that the said

circuit court of the United States for the southern district of New York be ordered to enter judgment for the plaintiff herein for the damages proved upon the trial of the action.

JAMES L. BISHOP,
Attorney for Appellant, 135 Broadway, Borough of Manhattan, New York City.

(Endorsed:) Supreme Court of the U. S.—William J. Buttfield, appellant, against George R. Bidwell, appellee.—Assignment of error.—James L. Bishop, attorney for appellant, No. 135 Broadway, New York city.—U. S. circuit court, southern district of New York, Filed Dec. 23, 1903, John A. Shields, clerk.

83 Circuit Court of the United States for the Southern District of New York.

WILLIAM J. BUTTFIELD
vs.
GEORGE R. BIDWELL. } Bond for Damages and Costs.

Know all men by these presents, that the Fidelity and Casualty Company of New York, a corporation duly organized and existing under the laws of the State of New York, with the principal office at No. 97 Cedar street, in the city, county and State of New York, is held and firmly bound unto the above named, George R. Bidwell, in the sum of two hundred and fifty dollars ($250.00) to be paid to the said George R. Bidwell, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seals, and dated this twentieth day of March, one thousand nine hundred and three.

Whereas, the above named, William J. Buttfield has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the circuit court of the United States for the southern district of New York, rendered in the above entitled suit.

Now, therefore, the condition of this obligation is such that if the above named, William J. Buttfield, shall prosecute said writ of error to effect, and answer all damages and costs, if he shall fail to
84 make his plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE FIDELITY & CASUALTY CO. OF NEW YORK,
[SEAL.] By EDW. C. LUNT, *3rd Ass't Sec'y.*

Form of Justification.

The Fidelity and Casualty Company of New York, surety, 97–103 Cedar street, New York city.

STATE OF NEW YORK, *City and County of New York,* } ss.:

On this twentieth day of March, 1903, personally appeared before me Edward C. Lunt, known to me to be the third assistant secretary of the Fidelity and Casualty Company of New York, who, being by me duly sworn, deposes and says that he resides in New York city, State of New York, that he is the third assistant secretary of the said The Fidelity and Casualty Company of New York and knows the corporate seal thereof; that the said company is duly and legally incorporated under the laws of the State of New York; that said company has complied and is now complying with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; and he further deposes and says that the following is a true copy of an extract from article III. of the by-laws of said company, whereby is shown the power vested in the president:—

"It shall be the duty of the president, or vice-president, to preside at the meetings of the board of directors, and to perform
85 whatever belongs to the executive department of the board. He may make insurances and all other contracts on behalf of the company, sign conveyances of real estate make transfers of stock and securities, execute satisfaction pieces of mortgages, and use the seal of the company when necessary in the business of the company. He may appoint agents and qualify them by certificates of authority to execute contracts of insurance on behalf of the company."

He further deposes and says that the following is a true copy of an extract from the minutes of the meeting of the board of directors of the company, held at its office in the city of New York, on the 19th day of November, 1902, a quorum being present, and that the resolution contained in said extract was unanimously adopted and is now in full force and effect:

"On motion it was duly resolved—that each of the following named persons, to wit: Robert J. Hillas, of the town of West Hoboken, State of New Jersey, treasurer-secretary of the company, Henry Crossley, of the borough of Brooklyn, city and State of New York, secretary of the company, Frank E. Law of East Orange, State of New Jersey, second assistant secretary of the company, and Edward C. Lunt, of the borough of Brooklyn, city and State of New York, third assistant secretary of the company, is hereby, jointly and severally, authorized to execute on behalf of the Fidelity and Casualty Company of New York, bonds, undertakings and all contracts of suretyship, and to bind said company as surety; and to

attest the corporate seal of the company to any and all bonds, undertakings and all contracts of suretyship which shall have been
86 signed by George F. Seward, the president of the company, or by either of the other secretaries designated herein."

He further deposes and says that the seal affixed to the annexed bond of William J. Buttfield is the corporate seal of the said The Fidelity and Casualty Company of New York, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as third assistant secretary of said company; and that he is acquainted with and knows him to be the secretary of said company; and that the signature of said —— —— subscribed to the said bond is in the genuine handwriting of said —— ——, and was thereto subscribed by order and authority of said board of directors, or the by-laws of said company, and in the presence of said deponent, and that the assets of said company, unincumbered and liable to execution, exceed in its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of five hundred dollars ($500).

He further deposes and says that —— —— residing at —— in the State of ——, has been duly appointed as the agent of said company to accept service of process against said company in the — judicial district of ——, and is authorized to enter an appearance in behalf of said company in any action, suit or proceeding brought against it in said judicial district.

[SEAL.] EDW. C. LUNT.

Acknowledged and sworn to before me and subscribed in my presence this 20th day of March, 1903.

[SEAL.] C. M. CRANE,
Commissioner of Deeds, City, County, and State of New York.

87 (Endorsed:) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant in error of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. Alfred C. Coxe, U. S. circuit judge. M'ch 23rd, 1903.—U. S. circuit court, southern district of New York, Filed Mar. 25, 1903, John A. Shields, clerk.

88 By the Honorable Alfred C. Coxe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to George R. Bidwell, Esq., Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the Capitol, in the city of Washington, on the 20th day of April 1903, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William J. Buttfield is plaintiff in error and you are defendant in error

to show cause, if any there be, why the error in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 23d day of March, in the year of our Lord one thousand nine hundred and three, and of the Independence of these United States the one hundred and twenty-seventh.

ALFRED C. COXE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

89 [Endorsed:] E. & A. C. 2025. Supreme Court of the United States. William J. Buttfield plaintiff in error *vs.* George R. Bidwell, defendant in error. Citation. A copy of the within paper has been this day received at this office Mar. 25, 1903. Henry L. Burnett, U. S. attorney, N. Y. 16 p'd. U. S. circuit court southern district New York. Filed Mar. 25, 1903 John A. Shields, clerk.

90 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court rooms in the borough of Manhattan, in the city of New York, on Wednesday the 20th day of May, in the year of our Lord one thousand nine hundred and three,

Present: The Honorable E. Henry Lacombe, circuit judge.

BUTTFIELD
vs.
BIDWELL.

Ordered that the time of the appellant herein to file the record on appeal in the above entitled cause be and the same is hereby extended to and including the 20th day of June, 1903.

E. HENRY LACOMBE,
U. S. Circuit Judge.

[Endorsed:] E. & A. C. 2025 Buttfield *vs.* Bidwell. Extension.

[Endorsed:] United States Supreme Court. William J. Buttfield pl'ff in error *vs.* George R. Bidwell def't in error

Endorsed on cover: File No. 18,947. S. New York C. C. U. S. Term No. 296. William J. Buttfield, plaintiff in error, *vs.* George R. Bidwell. Filed May 27", 1903.

Supreme Court of the United States.

WILLIAM J. BUTTFIELD,
Plaintiff in Error,

AGAINST

NEVADA N. STRANAHAN, Collector of the Port of New York,
Defendant in Error.

SIR:

Please to take notice that on the annexed petition of William J. Buttfield, a motion will be made in the Supreme Court of the United States, at the City of Washington, at 12 o'clock noon, on the first day of June, 1903, for an order advancing the argument of the appeal in the above entitled cause to such early date in the October Term, 1903, as to the Court may seem proper.

Yours, &c.,
JAMES L. BISHOP,
Counsel for Plaintiff,
Office and P. O. address,
135 Broadway,
Borough of Manhattan,
New York City.

To Hon. PHILANDER C. KNOX,
Attorney-General.

SUPREME COURT OF THE UNITED STATES.

WILLIAM J. BUTTFIELD,
Plaintiff in Error,

AGAINST

NEVADA N. STRANAHAN, Collector of the Port of New York,
Defendant in Error.

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of WILLIAM J. BUTTFIELD, plaintiff in error in the above entitled action, respectfully shows to this Court, as follows:

Your petitioner requests that the argument of the above entitled cause, which is now upon the docket of this Court, numbered 717 may be advanced and set down for such early day in the October Term, 1903, as may appear to the Court to be convenient.

The action was brought by the plaintiff in error in the Circuit Court of the United States, Southern District of New York, at law, to recover damages for the destruction by the defendant, as Collector of the Port of New York, of eight (8) packages of tea.

The defendant justified the seizure and destruction of the teas under the Act of Congress of March 2, 1897, entitled "An Act to prevent the importation of impure and unwholesome teas." ~~The plaintiff introduced~~ Evidence was introduced upon the trial, which was uncontroverted, that the teas in question were pure, unadulterated, genuine, wholesome and fit for consumption, and that they differed from the standard only in flavor; that the grade of the tea, as judged by the style and appearance, was First Gunpowder, which is the highest grade of tea

except one; that in quality it was a good Teenkai, 7
which is the seventh grade of country green teas in
quality, there being ten lower grades; that the
standard established, under the act, was of the fifth
or sixth grade in quality and excluded at least ten
grades of tea which have been and are ordinary arti-
cles of commerce, and which are pure, wholesome
and fit for consumption, and if enforced would have
excluded from importation into the United States
two-thirds of the entire crop of teas subject to the
particular standard applied in this case.

Your petitioner claims that the said Act of Con-
gress affords no protection to the defendant in the
destruction of the said teas, because the same is un-
constitutional for several reasons: First, because the 8
plaintiff was thereby deprived of his prop-
erty without due process of law; second, be-
cause the authority conferred upon the Secretary
of the Treasury to establish a standard which, in
his discretion, might exclude teas solely on the
ground of quality, that is, taste and flavor, was a
delegation of legislative power and was not a regu-
lation of commerce by Congress; and third, that
Congress had no power, under its authority to reg-
ulate commerce, to prohibit the importation of a
pure and wholesome article of food, except in the
exercise of its power to lay and collect taxes and to
provide for the common defense and general wel-
fare, and it appears that said act was not passed 9
for either of said purposes.

The plaintiff also contended that the Secretary of
the Treasury had no authority, under the said Act of
March 2, 1897, to establish a standard which would
exclude teas manifestly and unquestionably pure,
wholesome and fit for consumption, and that the
Secretary, having acted in excess of his powers, his
act afforded no protection to the defendant.

The questions presented in this case are of great
public importance and of special importance to im-
porters of teas into the United States.

An attempt has previously been made to present

to this Court the question of the constitutionality of the Act of March 2, 1897, in the case of Cruikshank *vs.* Bidwell, reported in 176 U. S., 78. In that case the Court held that the plaintiff had an adequate remedy at law, and did not consider the questions raised by the plaintiff as to the constitutionality of the act.

Large quantities of teas which are concededly pure and wholesome, and which are inferior to the standard in taste and flavor only, are constantly being excluded from importation into the United States under the authority of this act. The Secretary of the Treasury has ruled that in establishing the standard provided for in the act he may exclude the lowest grades of tea without considering the question of their purity or fitness for consumption, and he has declined to define what is meant by the lowest grades of tea. The standard of 1901 of country green teas applied in this case excluded all grades of country green tea except five, there being in all seventeen grades, and the evidence established that all but two of these were pure and fit for consumption.

Under the operation of the said act, as construed by the Treasury Department, the rights of the plaintiff and all other persons engaged in the business of importing teas are, in your petitioner's opinion, unlawfully denied, and continuous loss and injury is being inflicted upon persons engaged in importing teas into the United States.

WHEREFORE, your petitioner prays for an order advancing the argument of this case upon the calendar of the Court.

Dated New York, May 2[illegible]th, 1908.

WILLIAM J. BUTTFIELD,
Petitioner.

JAMES L. BISHOP,
JAMES H. SIMPSON,
Of Counsel.

STATE OF NEW YORK, City and County of New York, } ss.: 13

WILLIAM J. BUTTFIELD, being duly sworn, deposes and says: That he is the petitioner above named; that he has read the foregoing petition and that the same is true to the best of his information, knowledge and belief.

WILLIAM J. BUTTFIELD.

Sworn to before this 27th day of May, 1903.

LUTHER G. BILLINGS, Jr.,
Commissioner of Deeds,
New York City.

Supreme Court of the United States. 1

WILLIAM J. BUTTFIELD,
Plaintiff in Error,

AGAINST

GEORGE R. BIDWELL,
Defendant in Error.

SIR:

Please to take notice that on the annexed petition 2
of William J. Buttfield, a motion will be made in the Supreme Court of the United States, at the City of Washington, at 12 o'clock noon, on the first day of June, 1903, for an order advancing the argument of the appeal in the above entitled cause to such early day in the October Term, 1903, as to the Court may seem proper.

Yours, &c.,
JAMES L. BISHOP,
Counsel for Plaintiff.
Office and P. O. address,
135 Broadway,
Borough of Manhattan,
New York City. 3

To Hon. PHILANDER C. KNOX,
Attorney-General.

4 SUPREME COURT OF THE UNITED STATES.

WILLIAM J. BUTTFIELD,
Plaintiff in Error,

AGAINST

GEORGE R. BIDWELL,
Defendant in Error.

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

5 The petitition of WILLIAM J. BUTTFIELD, plaintiff in error in the above entitled action, respectfully shows to this Court as follows:

Your petitioner requests that the argument of the above entitled cause, which is now upon the docket of this court, numbered 719, may be advanced and set down for such early day in the October Term, 1903, as may appear to the Court to be convenient.

The action was brought by the plaintiff in error in the Circuit Court of the United States, Southern District of New York, at law, to recover damages sustained by the plaintiff by reason of the alleged
6 wrongful act of the defendant as Collector of the Port of New York in preventing the plaintiff from importing into the United States certain teas. The teas consisted of seventeen hundred and ninety-two (1,792) packages, which arrived at the Port of New York, consigned to the plaintiff's firm. They were examined by the Tea Examiner under the Act of March 2, 1897, entitled "An Act to prevent the importation of impure and unwholesome tea," and rejected as "inferior in quality." A few cases were rejected as "inferior in quality—smoky fychows." The plaintiff filed a protest and the teas were ex-

amined by the Tea Board of the United States 7
General Appraisers, and also rejected for quality. The plaintiff was then compelled to export the teas within six months, under the provisions of the said act, otherwise it was the duty of the defendant to destroy them. The plaintiff protested against the action of the Collector in refusing to permit him to import the teas into the United States, and gave a bond to export the teas, and did so at considerable loss.

On the trial the plaintiff proved by undisputed evidence that the teas were pure, wholesome, free from adulteration and fit for consumption and of a high grade; that the standard with which they were compared, to wit, the standard for Country Green 8
Teas No. 7 was fixed at an extremely high grade of teas, and excluded many grades of Country Green Tea which were pure, free from adulteration, genuine, fit for consumption and of superior grades. The defendant interposed, in effect, a general denial. The plaintiff claims that the defendant, in refusing to permit the teas to be imported into the United States for consumption, and in compelling him by duress of the destruction of the teas under the said act to export the same, was not protected by the statute, for the reason that it is unconstitutional; that it deprives the plaintiff and other tea importers of their rights of property and liberty without due process of law, and that insofar as it 9
authorizes the Secretary of the Treasury to establish standards in his discretion of the quality of teas which may be imported into the United States, it is a delegation of legislative power, the right to regulate commerce being, by the Constitution, conferred upon Congress only. The plaintiff further contends that the Secretary of the Treasury had no authority to establish a standard which would exclude the importation of pure and wholesome teas of a high grade and in every way fit for consumption, and that the establishment of the standard for Country Green Teas

10 No. 7 for the year 1901 was unlawful as being in excess of the powers of the Secretary of the Treasury, and afforded no protection to the defendant in preventing the plaintiff for importing the teas in question. The Court below dismissed the complaint.

The questions involved in this case are in many respects identical with those involved in the case of this plaintiff against Nevada N. Stranahan. The main difference is that in the Stranahan case the teas were destroyed. In this case the plaintiff was not permitted to import the teas and claims to recover the damages occasioned by the exportation of the teas.

11 The questions involved are of great public importance and of special importance to importers of teas into the United States.

An attempt has previously been made to present to this Court the question of the constitutionality of the Act of March 2, 1897, in the case of Cruikshank *vs.* Bidwell, reported in 176 U. S., 73. In that case the Court held that the plaintiff had an adequate remedy at law, and did not consider the questions raised by the plaintiff as to the constitutionality of the act.

Large quantities of teas which are concededly pure and wholesome, and which are inferior to the standard in taste and flavor only are constantly being excluded from importation into the United
12 States under the authority of this act. The Secretary of the Treasury has ruled that in establishing the standard provided for in the act he may exclude the lowest grades of tea without considering the question of their purity or fitness for consumption, and he has declined to define what is meant by the lowest grades of tea. The standard of 1901 of country green teas applied in this case excluded all grades of country green tea except five, there being in all seventeen grades, and the evidence established that all but two of these were pure and fit for consumption.

Under the operation of the said act, as construed

by the Treasury Department, the rights of the plaintiff and all other persons engaged in the business of importing teas are, in your petitioner's opinion, unlawfully denied, and continuous loss and injury is being inflicted upon persons engaged in importing teas into the United States. 13

WHEREFORE, your petitioner prays for an order advancing the argument of this cause upon the calendar of the Court.

Dated New York, May 27th, 1903.

WILLIAM J. BUTTFIELD,
Petitioner.

JAMES L. BISHOP,
JAMES H. SIMPSON,
Of Counsel. 14

STATE OF NEW YORK,
City and County of New York, } ss.:

WILLIAM J. BUTTFIELD, being duly sworn, deposes and says: That he is the petitioner above named; that he has read the foregoing petition and that the same is true to the best of his information, knowledge and belief.

WILLIAM J. BUTTFIELD.

Sworn to before me this
27th day of May, 1903.

15

LUTHER G. BILLINGS, Jr.,
Commissioner of Deeds,
New York City.

26571

Supreme Court of the United States.

WILLIAM J. BUTTFIELD, Plaintiff in Error, vs. NEVADA N. STRANAHAN, Collector of the Port of New York, Defendant in Error.	No. 294.
WILLIAM J. BUTTFIELD, Plaintiff in Error, vs. GEORGE R. BIDWELL, Defendant in Error.	No. 296.
WILLIAM J. BUTTFIELD, Claimant of Seven Packages of Tea, Plaintiff in Error, vs. THE UNITED STATES, Defendant in Error.	No. 516.

BRIEF FOR PLAINTIFF IN ERROR IN EACH OF THE ABOVE ACTIONS.

William J. Buttfield has sued out a writ of error in each of the above actions for the purpose of reviewing the judgments entered therein.

The judgment in the action brought by Mr. Buttfield against Nevada N. Stranahan, Collector of the port of New York (No. 204), was entered upon the verdict of a jury found by the direction of the Court in favor of the defendant dismissing the complaint.

The judgment in the action brought by Mr. Buttfield against George R. Bidwell, Collector of the port of New York (No. 206) was entered upon a verdict found by the direction of the Court in favor of the defendant dismissing the complaint.

The judgment in the action brought by the United States against Seven Packages of Tea was rendered in favor of the plaintiff for a forfeiture of the seven packages of teas of which Mr. Buttfield was the claimant.

In each of these actions the plaintiff in error based his right of recovery upon the unconstitutionality of the Act of Congress passed March 2, 1897.

I.

An outline of the Act of March 2, 1897.

The act is entitled "An Act to prevent the importation of impure and unwholesome tea."

Section 1 renders it unlawful for any person to import any merchandise as tea "which is inferior in purity, quality and fitness for consumption to the standards provided in Section 3 of the Act, and the importation of all such merchandise is hereby prohibited."

Section 2 requires the Secretary of the Treasury to appoint a board, to consist of seven members, experts in teas, to prepare and submit to him standard samples of tea.

Section 3 directs the Secretary of the Treasury, upon the recommendation of said board, to "fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported

into the United States," and to deposit samples in certain custom houses, and provides that "all teas or merchandise described as tea, of inferior purity, quality or fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof."

Section 4 provides for the examination of teas entered in the Custom House by the tea examiner.

Section 5 provides that if, after such examination, the tea is found by the examiner to be equal in purity, quality and fitness for consumption to the standard, a permit shall be granted to the importer, declaring the tea free from the control of the customs authorities, but if it is found to be inferior in purity, quality and fitness for consumption to the standard, the importer shall be notified, and the tea shall not be released, unless a re-examination is called for by the importer.

Section 6 provides that if such re-examination is called for, "the matter in dispute" shall be referred for decision to a board of three United States General Appraisers, and if such board finds the tea in question to be equal in purity, quality and fitness for consumption to the proper standards, a permit shall be issued by the Collector for its release and delivery to the importer, but if not the importer shall give a bond to export the tea out of the limits of the United States within a period of six months after such final re-examination, and if the same shall not have been exported within the time specified, the Collector at the expiration of that time shall cause the same to be destroyed.

Section 9 provides as follows: "That no imported teas which have been rejected by a customs examiner or by a board of United States General Appraisers, and exported under the provisions of this Act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition."

II.

Statement of facts in Buttfield vs. Stranahan. (No. 294.)

This was an action of trespass. The complaint sets out (Record, p. 3) that the plaintiff was the owner of eight packages of tea imported at New York by the Steamer *Adana*, marked as described, and stored in a bonded warehouse in the Borough of Brooklyn, City of New York; that on the 7th of November, 1902, the plaintiff tendered to the defendant Collector of Customs at that Port, the customs duty payable upon said teas, and demanded delivery; that on the 8th of November, 1902, the plaintiff applied to the defendant for an export permit, which was refused; and on the 16th of November, 1902, the defendant wrongfully seized, removed and destroyed the teas.

The action was originally brought in the Supreme Court of the State of New York, and was removed by the United States Attorney for the Southern District of New York by a writ of *certiorari* into the United States Circuit Court for the Southern District of New York (p. 5).

The defendant appeared and answered, admitting that he was the Collector of Customs at the port of New York, but denying every other allegation of the complaint (fol. 9).

The case was brought to trial before Mr. Justice Coxe, and a jury. It was stipulated on the trial that the plaintiff duly tendered to the defendant the amount payable as duties on the teas, and demanded the teas, and that the defendant declined to accept the duties or to deliver the teas; that afterwards and before the commencement of this action the defendant ordered that the teas be taken to the United States Public Stores for destruction, and "that the said teas were thereafter removed by the defendant from the place where they were stored to the United

States Public Stores and were there destroyed by the defendant" (fol. 4).

It was further admitted that the packages of tea in question were entered by the plaintiff's firm at the Custom House in the City of New York on January 21, 1902; that they were examined by the examiner of teas at that port and were rejected as "inferior to standard in quality"; that the plaintiff's firm appealed to the Board of United States General Appraisers who afterwards certified that "the said tea is inferior in quality to the standard prescribed by law," and accordingly overruled the appeal; that the plaintiff's firm was notified of this decision on March 12, 1902, and it was admitted "that said teas were in fact inferior in quality to the said standard, provided that by quality is meant taste and flavor (the plaintiff not, however, conceding that the Act of 1897 is constitutional or that the standard was lawfully fixed by the Secretary of the Treasury)" (Record, fols. 5, 6, 7).

The evidence shows that the plaintiff applied to the defendant for a permit to withdraw the teas for consumption; that application was refused on the ground that the teas had not been released under the Act of March 2, 1897 (Plaintiff's Exhibit I, fol. 8). The plaintiff then tendered the duties, which the defendant declined to accept, because they were not accompanied by a withdrawal order and a permit (pp. 13, 14).

Afterwards, the plaintiff demanded delivery of the teas for export, which the defendant denied on the ground that the six months, fixed by the Act of March 2, 1897 in which exportation was allowed, had already expired, and notified plaintiff that "the tea will be ordered to the United States public stores for destruction" (pp. 16, 17).

The plaintiff was called as a witness in his own behalf and after having testified that he was the owner of the teas (fol. 28) which were stored in a warehouse in Brooklyn, and that he had made the various tenders and demands referred to above,

further stated that he was a citizen of New Jersey and of the United States; that the teas in question were classified as "Country Green Teas," and he produced a schedule of Country Green Teas, arranged in order of quality (p. 19, Exhibit No. 8). He stated that the Government standard of Country Green Teas No. 7 established by the Secretary of the Treasury under regulations of March 31, 1901 was the standard in force at the time of the rejection of these teas; that this standard was a "Finest Teenkai" corresponding to quality No. 4 on Exhibit 8, and that it excluded all teas below No. 6 on Exhibit No. 8, that is eleven out of the seventeen grades of quality; that the quality of the rejected teas was an "On Fine Teenkai" corresponding with No. 7 on Exhibit 8; that in style and appearance the teas were second in grade; that in cup quality or quality that is in taste and flavor, they were the seventh on Exhibit 8; that they were absolutely pure, entirely genuine and free from adulteration and that there was nothing about the teas that indicated in any way that they were unwholesome or unfit for consumption, and that the average quality of Country Green Tea is higher than that of other kinds of teas imported into this country.

Several experts were called who testified that the standard for Country Green teas of the year 1901 was, as shown on Exhibit 8, a Finest Teenkai; that it excluded all the grades below No. 6 on said exhibit, that is, that it excluded the eleven lower grades all of which were pure and wholesome and fit for consumption, with the exception possibly of the two lowest, and that the standard would exclude all Fychow and Wenchow teas which had been ordinary subjects of commerce in this country and which were pure, wholesome and fit for consumption (Thorn, fol. 48); that the rejected teas in question were not in any degree impure, were genuine tea leaves, free from adulteration and that there was nothing whatever about their grade or quality which rendered them unfit for consumption; that

they were slightly inferior in flavor to the standard, and that was the only difference (Thorn, fol. 48). Mr. Thorn testified that the rejected tea "was a higher grade of tea than the standard, the standard was a Hyson, and this was a first Gunpowder. I didn't see any spurious or exhausted leaf among this tea. It would not be possible to say that these teas were in any sense of low quality or grade of tea" (fol. 44). This testimony was corroborated by Mr. Joseph H. Lester, a witness called for the plaintiff (p. 26).

The defendant called as a witness Mr. George Hewlett, who said that he was the vice-president of the National Tea Association of the United States, and also Chairman of the Board of Tea Experts of the Treasury Department, and had held that last named office for the past five years. He said that the standard for Country Green teas as shown upon Exhibit 8 was a Hyson of a fine Teenkai chop, and that this standard was adopted because at the time the Board could not find a Hyson of lower grade in the New York market.

On cross-examination, he testified as follows: "This standard Country Green tea No. 7 for the year 1901, the tea we are discussing, is a fine quality of tea. I should say that there were not a good many qualities of tea below that standard that were entirely palatable. In my opinion there were grades inferior to No. 7 that were perfectly pure, genuine tea leaves, free from adulteration and different from standard only in flavor. That was true in regard to these teas in question—the eight packages—that they differed from the standard only in flavor, that is, the flavor in my opinion was decidedly inferior to the flavor of the standard, that is the only distinction that I found between these teas and the standard" (p. 29, fol. 61).

He testified also that the rejected tea in question was a pure tea, but of a low quality (fol. 56), and that he would grade it as No. 11 on Exhibit 8.

On further redirect-examination he testified that

in his opinion there were no teas in the market in the necessary quantity at the time the standard was selected that could be obtained that were pure, and that were inferior in cup quality to these teas which were selected as a standard, and that could be bought in the necessary quantity for use as Government samples, and "while such teas are produced they were not available for selection when the board was in session for the selection of samples" (fol. 62).

The evidence of this witness as to the difficulty of obtaining samples of inferior grades of Country Green Teas which were, in his opinion, suitable for a standard, although such grades existed, was met by the testimony of the plaintiff's witnesses to the effect that there were thousands of packages of Country Green Teas admitted under the standard for the year 1900, pure and fit for consumption of lower quality than the standard from which such selection might be made then in this country (fols. 70, 72, 74). The evidence also showed that if the standard No. 7 had been enforced 75 per cent. of the entire crop of Country Green Teas would have been excluded, and that if a similar standard of quality had been applied to other classes of teas 75 to 80 per cent. of all the teas that are usually imported into this country would have been excluded (fol. 71).

One witness said: "If this standard of fineness, &c., adopted as the standard in this particular case of Country Green Tea had been employed as the standard in the general body of teas, about the same proportion of the general crop would have been excluded as that of green tea; three-fourths of the crop" (fols. 75, 76).

At the conclusion of the evidence the Court directed a verdict for the defendant upon the motion of the defendant's counsel.

The plaintiff's counsel raised the question of the constitutionality of the law upon several grounds, and the Court directed a verdict for the defendant, dismissing the complaint on the merits, with costs.

III.

Statement of facts in the case of Buttfield vs. Bidwell, No. 296.

This was an action of trespass on the case for damages sustained by the plaintiff by reason of the alleged wrongful act of the defendant in refusing to permit him to bring certain teas into the United States, and threatening to destroy the same unless removed within six months.

The action was brought in the Circuit Court of the United States for the Southern District of New York on the ground of diversity of citizenship and also as arising under the constitution and laws of the United States.

The complaint (Record, p. 3) alleged that the plaintiff's firm was engaged in the business of importing and dealing in teas in the City of New York, and that the defendant was the Collector of the Port of New York. That on the 14th of December the defendant, under color of his office, and by the improper exercise of his powers and authority, unlawfully prevented the plaintiff's firm from importing two hundred and twenty-six packages of Country Green Tea, shipped from China and consigned to them by the steamer *Arara*; that the teas were of a class known as Country Green Teas, and were subject to duty, and were duly entered with the defendant as Collector; that they were examined by the tea examiner, who reported that they were inferior in quality to the standard, and the defendant notified the plaintiff that the teas were prohibited from importation into the United States; that the plaintiff protested against the finding of the examiner and the Board of General Appraisers, who thereafter reported to the defendant that the teas were inferior in quality to the standard, and that the defendant notified the plaintiff that his protest was overruled; that the defendant thereupon refused to permit the plaintiff to

withdraw the teas for consumption, and refused to permit the plaintiff to take any other action regarding the said teas, except to export them; the complaint further alleges (p. 7) that the action of the defendant was taken under the Act of 1897, which is void as being in violation of the Constitution of the United States, that the Secretary of the Treasury was not authorized by the said act to fix the standard known as No. 7 for Country Green Teas, and that in so doing he exceeded his powers, and that the teas offered for import were of a high grade in quality, wholesome, free from adulteration and fit for consumption, and were entitled to be admitted into the United States as lawful importation upon payment of duties.

The complaint set up a second cause of action in substantially the same language with regard to twelve hundred and seventy-five packages of Country Green Teas imported by the steamers *Glengyle* and *Ataka* (fol. 9), and a third cause of action of similar import with regard to one hundred and eighty-nine packages imported by the steamer *Satsuma* (fol. 10), and a fourth cause of action of similar import with regard to two hundred and fifty-eight packages of tea imported by the steamer *Adana* (fol. 11). The plaintiff alleged by reason of the unlawful acts of the defendant he sustained damages in the sum of twenty-eight hundred ($2,800) dollars, with interest.

The defendant answered, admitting that he was the Collector of Customs at the Port of New York, denying on information that the plaintiff was a resident of the State of New Jersey, and absolutely denied each of the other allegations of the complaint (fol. 14).

The action was brought to trial before Mr. Justice Coxe and a jury. The entry of the teas by the *Satsuma* was proven (fol. 10, Exhibit No. 4) and it was admitted that the teas arriving by the *Ataka*, *Adana* and *Glengyle* were entered in the same form as Exhibit No. 4; that the invoices for

each shipment were filed with the defendant in the same form as Exhibit No. 2, referring to teas by the *Satsuma*, and that upon the invoices there was stamped the tea examiner's ground of objection, as set out in Exhibits 3, 6, 7 and 8 (fol. 12). From these exhibits it appears that one hundred and eighty-nine packages or half chests from the steamer *Satsuma* were rejected by the examiner as "inferior to standard in quality;" that six hundred and five packages from the steamer *Ataka* were rejected by him as "inferior to standard in quality;" that eighty-seven packages therefrom were rejected by him as "smoky Fychows, inferior to standard in quality;" that two hundred and fifty-eight packages from the steamer *Adana* were rejected by him as "inferior to standard in quality;" that four hundred and thirty-five packages from steamer *Glengyle* were rejected by him as "inferior to standard in quality, and that one hundred and forty eight packages therefrom were rejected by him as "inferior to standard in quality—smoky Fychows" (p. 14).

It was stipulated that a protest was made by the plaintiff against the findings of the tea examiner regarding the teas shown upon Exhibits 3, 6, 7 and 8, and that the matter was brought for decision before the Board of United States General Appraisers, said protest resulting in the ruling shown in Exhibit 9 (p. 16), and a similar ruling with regard to the other teas (fols. 19, 20).

The ruling of the Board of General Appraisers, shown by Exhibit No. 9, was that "the said tea is inferior in qua[illegible] to the standards prescribed by law" (fol. 20).

Under the course of business at the Custom House with regard to tea importations no teas can be withdrawn before a ruling has been made and reports filed by the tea examiner, nor can duties be paid before such ruling releases the teas (fol. 20). No teas are released, neither can any be withdrawn from bond, until the examiner or the Board of

General Appraisers has reported in favor of such release (fols. 24 and 27). A release in printed form is required headed "Permit for Release of Imported Tea." A copy of this form is set out at folio 26. An importer cannot remove or withdraw for consumption from a bonded warehouse, teas which have been entered, without first obtaining a report of the tea examiner, or of the Board of General Appraisers, that the teas are equal to the standard in purity, quality and fitness for consumption, nor can he pay the duties before such report is presented. An offer to pay duties would be useless (fol. 28). Before teas can be landed a permit must be issued directing the teas to be sent to a designated bonded warehouse (p. 21).

The plaintiff testified (p. 22) that he had been engaged in the business of importing teas into the United States for fifteen years, and on an average imported about twenty per cent. of all the teas imported at the port of New York (fol. 35). He stated that the standard No. 7 for Country Green Teas was established by the regulation of the Secretary of the Treasury March 31, 1901; that Country Green Teas are grown in a certain district in China and are distinct from Ping Suey green teas, which are also grown in China (fol. 36). They are divided into five classes, known as Moyune, Teenkai, Fychow, Wenchow and Shanghai packed (fol. 37). He produced a schedule of Country Green Teas arranged in order of quality, marked Exhibit No. 12 (corresponding to Exhibit No. 8 in Buttfield *vs.* Stranahan).

It was admitted that a certain prescribed quantity of physical tea was made the standard for the year 1901 by the selection of the board of tea experts and the approval of the Secretary of the Treasury, and that if quality means taste and flavor, the plaintiff's importations involved in the present case are not up to the Standard No. 7 for Country Green Tea established by the Secretary (fol. 43). The witness stated that the quality of Standard No. 7 for 1901 was of

finest Teenkai, as shown on Schedule No. 12; that of the qualities specified on that schedule, numbers 6 to 15 are pure, wholesome and fit for consumption and free from adulteration, and have been ordinary subjects of commerce; that most of them were admissible under the standards fixed by the Secretary previous to 1901; that the teas in question offered for import were pure, of genuine tea leaves, wholesome and fit for consumption; that there was nothing about the teas to render them unsuitable as articles of food; that the standard for Ping Suey teas for 1901 was very much inferior in quality to Standard No. 7, and that the teas offered for import and rejected in this case were all superior to the standard for Ping Suey teas, and were all equal to the Country Green standard established previous to March 31, 1901, and are equal to the standard established after 1901, that is, for 1902 (fols. 52, 53), and that teas of the same class, which were rejected in 1901, have been admitted under the standard for 1902 (fol. 53).

The plaintiff produced notices from the defendant of the rejection of the teas in question (pp. 29, 30; fols. 56-60), and his protest to the defendant against the rejection (p. 32, Exhibit 16). He testified that he was compelled to sell for export or export the teas, and that the difference between the amount he realized upon a sale of the teas and the value at the Port of New York at time of rejection was two thousand two hundred and eighty-one and $\frac{19}{100}$ ($2,281.19) dollars (fol. 67).

On cross-examination the plaintiff produced a schedule of the grades and qualities of the different teas which are the subject of this action (p. 36, Exhibit 18). He called two expert witnesses who testified to the correctness of Schedule Exhibit 12 (fol. 88). They both testified that the standard was finest Teenkai, as shown on that schedule (fol. 89, fol. 117); that all teas above the upper line drawn across Exhibit 12 were admitted and that all below that line should be excluded under the standard (fol.

89, fol. 118). Mr. Gillet testified that the only teas below the standard unfit for consumption are mixed Shanghai packed and adulterated Shanghai packed; that common Wenchow teas were frequently fit for consumption. Above that grade all teas were pure teas, and fit for consumption and proper articles of food (fols. 91, 92). He produced a schedule of the teas in suit, showing their grade as to quality (p. 41, Exhibit 19).

Mr. Thorn testified that the standard excluded all Fychow and Wenchow teas, and that a great many of them are ordinary subjects of commerce and fit for consumption; that the standard for country green teas was much higher than that for Ping Suey teas (fols. 118, 119). He also produced a schedule showing the grades and qualities of the rejected teas in question. He testified that the teas were not in the slightest degree more deleterious to health than other kinds of tea; were absolutely pure and free from adulteration; were genuine and free from spurious and exhausted leaves, and that there was nothing about them to indicate or suggest that they were presumably impure, unwholesome or unfit for consumption (fols. 127, 128); that they were all very much better than the Ping Suey standard for the same year, and that they were all above the grade 9 on the Schedule No. 12; that they were such teas as were largely dealt in previous to 1901 (fol. 129).

When the plaintiff offered to produce further expert testimony upon this subject, the Court said:

"It seems to me it is undoubtedly a question of law upon this record, and I think that you, Mr. Bishop, have already sufficient evidence to warrant a direction of a verdict in your favor, provided you are correct upon the law question; that is, that this act is unconstitutional, and if it be constitutional and the Secretary has improperly excluded the teas, and if it is to be construed as you contend it is, then you have made a case. Otherwise you have not. Therefore, it does not strike me as at all material to

multiply the expert testimony. We want to get this record so that the question will be finally determined by the Supreme Court. I want it perfectly clear that the plaintiff has made a case upon the facts, provided the law is with him" (fol. 159).

It further appeared that the average annual importation of teas into the United States was approximately ninety million pounds (fol. 161). The average annual importation of Country Green teas is from six million to eight million pounds, and that two-thirds of the total crop of Country Green teas will be excluded under the standards of 1901 (fol. 162).

The defendant's counsel moved for a direction of a verdict on the ground that the act is constitutional, and that it is for the Secretary to decide as to the standard which is to be adopted, which decision cannot be reviewed by the Court in this action, and that there is not sufficient evidence that the Secretary of the Treasury has acted in any way improperly; also on the ground that assuming the act to be unconstitutional, or if it were assumed that the Secretary had acted improperly in the matter, no cause of action in tort is established against Mr. George R. Bidwell (fols. 166, 167).

Plaintiff's counsel asked for a direction of a verdict upon the ground that the act is unconstitutional, and that if constitutional, the Secretary of the Treasury had established a standard which was unwarranted by the law, and it afforded no protection to the defendant in rejecting the teas.

The Court ordered a verdict for the defendant dismissing the complaint on the merits, with costs.

IV.

Statement of facts in the case of United States against Seven Packages of Tea. No. 516.

This was an action to forfeit seven packages of tea, pursuant to the ninth section of the Act of

1897, which reads as follows: "That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers and exported under the provisions of this act shall be re-imported into the United States under the penalty of a forfeiture for a violation of this prohibition."

The information states that on April 29, 1902, at the Bartlett Stores, in Brooklyn, the Collector of the Port seized seven packages of tea of the value of ninety-two dollars, as forfeited under the provisions of this act, and states as the cause of forfeiture that the teas were the property of William J. Buttfield, and were re-imported by him, with knowledge of proceedings previously had; that these seven packages of tea had been previously imported by Buttfield into the United States, and had been rejected by the customs examiners and by a board of general appraisers, under the provisions of the Act of March 2, 1897, and that Buttfield executed a bond for the removal of the teas, and that he exported the teas under the conditions of the bond, and subsequently re-imported them on the 3d of April, 1902.

Mr. Buttfield appeared and claimed the teas, and filed a demurrer to the information, arguing that the act was unconstitutional. The Court overruled the demurrer, and entered judgment for the forfeiture of the tea.

Assignment of Errors in the Straubenzee Case.

The plaintiff assigned as error that the Court directed a verdict for the defendant dismissing the complaint, because on the conceded facts the defendant had destroyed his property without warrant of law if the Act of 1897 was unconstitutional, or if the standard for country green teas fixed by the Secretary of the Treasury by regulations of March, 1901, was unauthorized by law.

The assignment of error specified the grounds

of unconstitutionality in substance, that the act deprived the plaintiff of his property without due process of law, in that it prohibited him from trading in tea, except at the unregulated discretion of the Secretary of the Treasury, and because it unnecessarily, unreasonably and arbitrarily prohibited the importation of a wholesome article of commerce, and because it permitted an unjust discrimination in teas which might be imported by dealers in different classes of teas, and because the plaintiff was deprived of his property without due process of law, in that he was not given such a hearing before the rejection of his teas as he is entitled to, and because he was deprived of his property, which was destroyed, without a judicial hearing (see Assignment of Errors, p. 41).

Assignment of Errors in the Bidwell Case.

The plaintiff assigns as error that the Court directed a verdict for the defendant dismissing the complaint, and that a verdict should have been directed in his favor, because the defendant prohibited and prevented him from bringing into the United States teas which were the subject of the action and which he had a legal right to bring in, and that the defendant was, therefore, liable for the damages sustained by the plaintiff by reason of his unlawful act; that the Act of 1897 afforded him no protection in the rejection of the teas for the reason that it is unconstitutional, because it deprived the plaintiff of his liberty and property and property rights without due process of law, in that it prevents the plaintiff from trading in tea in the unregulated discretion of the Secretary of the Treasury, and prohibits him unnecessarily, unreasonably and arbitrarily from importing wholesome teas, and that it permits unjust discrimination in the importation of teas by dealers in different classes of teas, and that he was also deprived of his property rights without due process of law in that

the teas were rejected and prohibited from importation without due notice and hearing, and further, that the standard established by the Secretary of the Treasury for Country Green teas was illegally established and afforded no protection to the defendant (see Assignments of Error, Record, p. 71.)

Assignments of Error in Seven Package Case.

The plaintiff in error assigns as error that the Court overruled the demurrer to the information because no forfeiture of the tea could be legally had under the provisions of the Act of March 2nd, 1897, since that act violates rights secured to the plaintiff under the Constitution of the United States, in that it attempts to deprive him of his property without due process of law, and that the act is also unconstitutional because Congress thereby delegates the power to regulate commerce to the Secretary of the Treasury and a board appointed by him. In amplification of the charge that the act deprives the plaintiff of due process of law, the specifications are that it deprives him of his right to pursue a lawful industry—the importation of teas—except at the arbitrary will of the Secretary of the Treasury, and that the act does not provide for notice or an opportunity to attend and be heard before the rejection of teas by the Examiner or by the Tea Board of General Appraisers.

POINTS.

I.

The Act of 1897 is unconstitutional, because (1) it makes the right to import tea depend upon the arbitrary

action of the Secretary of the Treasury and a board appointed by him, and (2) excludes from import wholesome, genuine and unadulterated tea, and (3) discriminates unequally in the admission of the different kinds of teas for import, and in the right to sell and purchase tea.

1. *The act confers upon the secretary and the board the uncontrolled power to fix standards of purity, quality and fitness for consumption, and thus to prescribe arbitrarily what teas may be imported and dealt in.*

(1.) The construction of the statute came before the Court for the first time in *Sang Lung* v. *Jackson*, 85 Fed. Rep., 502 (N. D., of Cal., 1898, De Haven, Dist. Judge). That action was brought by a great number of resident aliens, subjects of the Empire of China, against the Collector of Customs at the port of San Francisco, to enjoin the defendant from proceeding to destroy a quantity of "Canton," tea, imported by the complainants. The teas had been rejected by the tea examiner as not equal to the standards, there being no standard named for "Canton tea"; on appeal to the Board of General Appraisers the decision of the tea examiner was affirmed and the defendant refused to issue a permit for the entry of the tea for consumption on the sole ground that there was no standard established by law for the tea. The defendant demurred to the bill, and the demurrer was sustained. In the course of his opinion, the District Judge said:

> "The power, then, to prescribe the conditions upon which foreign merchandise may be imported into the United States, is one that resides with Congress, and *the right of importation is therefore not an absolute or vested right under the Constitution, but must be exercised in subordination to the rules which*

may be prescribed by Congress." * * * "The complainants seek to bring this case within the rule of equity jurisdiction, by alleging that the regulations adopted by the Secretary of the Treasury, for the purpose of determining the quality of imported tea, are contrary to the act of Congress, because such regulations omit to establish a standard of quality for Canton tea. I do not deem it necessary to determine whether such regulations, properly construed, prohibit the admission of Canton tea, if it is not inferior in quality to either of the special standards named in such regulations. It is alleged in the bill that such is the effect of the regulations, and that the board of general appraisers based its decision entirely upon such construction of the regulations of the Treasury Department; *but I do not think the complainants have any such absolute or vested right to import tea into the United States as authorize a court of equity to inquire whether the Secretary of the Treasury in establishing standards, under the act of March 2, 1897, or the board of general appraisers in its decision, made any mistake, either of law or fact.* The principle upon which courts of equity act in asserting a jurisdiction to set aside or correct either judicial or executive action is that such jurisdiction is necessary in order to preserve some *vested right* in the complainant which otherwise would be impaired or lost. That principle does not apply here. *Congress might have absolutely prohibited the importation of Canton tea without violating any vested rights of the complainants. Having the right to prohibit, it has plenary power to prescribe the condition upon which such importation may be made;* and as the right to import tea into the United States is made by the act of Congress to depend entirely upon the final judgment of the board of general appraisers that it is equal in quality, purity, and fitness for consumption to the standards established by the Secretary of the Treasury, it would seem to follow that a person desiring to import such merchandise is not entitled to resort to a court of equity for the purpose of setting aside or correcting such final

> determination, upon the alleged ground of mistake made by such special tribunal. The act of Congress contemplates that the decision of the board of general appraisers shall be final, and not subject to revision by the courts. The demurrer will be sustained and the bill dismissed."

This opinion proceeds upon the theory that Congress may absolutely prohibit the importation of tea or may prescribe the conditions upon which importation may be made, and that the action of the Secretary in establishing or failing to establish a standard under the statute cannot be questioned by the courts for mistake of fact or law. The short proposition is this: that the right to trade abroad may be abolished and there may be substituted a privilege to trade dependent on the will of the Secretary of the Treasury.

(2.) The same opinion is expressed more concisely in *Cruikshank* v. *Bidwell* (86 Fed. Rep., 7, S. D. N. Y.). That was a suit to enjoin the enforcement of the act as being unconstitutional, and Judge Lacombe said:

> "The act which plaintiff criticizes in this case is apparently framed, as are the exclusion acts, in conformity with prevailing theories, to leave the decision of disputable questions with an administrative officer rather than with the courts. Such a system is, of course, open to abuse, but it is not necessarily in all cases unconstitutional. *No citizen of the United States has a vested right to import teas if Congress, under its power to regulate commerce, prohibits their importation.* And if that body chooses to admit only those teas which may be approved by such administrative officer as it selects the legislation is similar to that which gives to an administrative officer the power to determine finally whether an alien has or has not sufficient property to be allowed to enter. In view of the decisions of the United States Supreme Court in Lem Moon Sing *v.* U. S., 158 U. S., 538, 15 Sup. Ct., 967, and a line of similar cases, such

legislation seems not to be obnoxious to the objection that it is unconstitutional. Motion denied."

(3.) The Government insists upon this construction of the statute, and it has been approved in the cases at bar.

When the case of *Cruikshank* v. *Bidwell* was before this Court (176 U. S., 73) in the brief filed on behalf of the Government, it was said: "The foregoing instances confirm the proposition that the power of Congress over foreign commerce is such that nobody can be said to have an inherent right to import goods; *that the importation of goods from abroad is by permission of Congress*, and that it is subject to such restrictions as Congress may see fit to impose, and to the supervision of such officials as Congress may see fit to provide for that purpose."

On the trial of each of the cases at bar the same position was taken by the counsel for the Government. In the Bidwell case, objection was taken to evidence as to the character of the teas upon the ground that the standard having been selected by government officials, appointed by Congress for that purpose, is conclusive and cannot be reviewed in any court (Record, Buttfield *v.* Bidwell, fol. 54).

Again, counsel for the Government asked for a direction of a verdict upon the ground "that it is for the Secretary to decide as to the standard which is to be adopted, which decision cannot be reviewed by this Court in this action" (Buttfield *v.* Bidwell, Record, fol. 166).

So where evidence was offered to show that the standard was so fixed as to exclude teas of a high grade entirely pure, wholesome and fit for consumption, counsel for the Government interposed this objection:

"Of course by not putting in objections to this we do not waive the objection that the Secretary of the

Treasury is the proper judge of what tea is of good quality and fitness for consumption" (Stranahan Record, fol. 41).

In the Bidwell case counsel for the Government objected to similar testimony upon the ground "that the Act of 1897 authorizes the board to establish standards which take into consideration not only purity and wholesomeness but also quality, meaning thereby the attributes that are tested by the senses of smell and taste; that the standard, having been selected by Government officials appointed by Congress for that purpose, is conclusive and cannot be reviewed in any Court, and therefore it is entirely immaterial to go into any question of dispute as to whether or not any particular grade of tea, as recognized by the tea trade, was admitted or excluded" (fol. 54).

(4.) The language of the act fixes no other rule of admission than the will of the Secretary upon the recommendation of the board.

The question is, what tea has Congress permitted to be imported? Until the Secretary fixes the standard no teas can be imported (*San Lung* v. *Jackson*, *supra*). If the Secretary has fixed standards, no teas can be imported which are inferior to the standards. Does the law define any rule as to what the standard shall be? Is the discretion of the Secretary limited at any point? He is authorized to fix standards of purity, quality and fitness for consumption; but each of these are terms of comparison.

Purity.—The act contains no provision that impure teas shall not be admitted. The implication is that some degree of impurity in tea may be permitted. Indeed, it cannot be otherwise, since no vegetable product is absolutely pure. The standard may be fixed anywhere as to purity at the will of the Secretary.

Fitness for Consumption.—These words give the Secretary of the Treasury unlimited power to exclude teas according to his idea of fitness for consumption. An article which one man or class of men might regard as entirely fit for consumption might be regarded by another man or class of men as utterly unfit.

Quality.—The quality of an article is its character in the broadest sense. The following are the dictionary definitions of the word:

WEBSTER: "The condition of being of such or such a sort as distinguished from others; nature or character relatively considered, as of goods; character; sort; rank."

WORCESTER: "The nature of a thing relatively considered; property of a thing; attribute."

CENTURY: "Degree of excellence or fineness; grade; as the food was of an inferior quality; the finest quality of clothing."

Mr. Whitney, of counsel for the Government in the brief submitted by him to the Circuit Court of Appeals in *Buttfield* v. *Bidwell*, says: "The term 'quality' is a very familiar one in the English language. It is not synonymous with 'wholesome,' it does not represent hygienic qualities. It represents the attributes of an article in their widest scope. No broader jurisdiction could be given over an article than by giving power to regulate its quality."

The words "purity," "quality" and "fitness for consumption" afford no rule of admission and fix no limit to the power of exclusion.

(5.) It appears from the history of legislation that it was the intention of Congress to confer unlimited power upon the Secretary.

The first act regulating the importation of teas was passed March 2, 1883 (ch. 64). It

prohibited the importation of tea "adulterated with spurious leaf or with exhausted leaves, or which contained so great an admixture of chemicals or other deleterious substances as to make it unfit for use." This was an attempt to establish a definite rule of exclusion. After the tea examiner rejected the teas a re-examination was to be had before a committee of three experts, one to be appointed by the Collector, one by the importer, and the two to choose a third.

In 1890 the food law was enacted (Laws of Congress, 1890, Ch. 339). It provided "that it shall be unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous, spirituous or malt liquors adulterated or mixed with any poisonous or noxious chemicals, drug or other ingredient, injurious to health."

In commenting upon the effect of this act on the importation of tea in an official report of the United States Agricultural Department in 1892, on food and food adulterations, part 7, page 98, it is said: "With the strict enforcement of the U. S. Adulteration Act (Act of 1890), the consumer is reasonably *well protected so far as securing the genuine leaf is concerned, but of course has no protection from the sale of inferior teas.*"

The Act of 1897 worked a complete revolution in the mode of regulating the importation of teas. It did not prohibit the importation of impure or unwholesome teas, or of teas of any distinctive character. It prohibited the importation of *all* teas except such as were equal to the standards fixed by the Secretary. These were not standards of exclusion, but standards of admission. Unless, therefore, the standards permitted the introduction of particular teas they were excluded. This was a change of the most radical character. It was the substitution of a privilege for a right legally enforceable. If the intention had been to exclude merely unwholesome teas no statute was necessary, for the law, as it then stood, both under the Act of 1883 and the

Act of 1890 excluded such teas. It is obvious that the change in legislation was intended (1) to establish a physical standard of admission in place of a rule of exclusion, and (2) to give the board of experts and the Secretary the authority to fix standards according to their uncontrolled judgment, which should be conclusive.

In a report of the Senate committee, submitted with the bill of 1897, attention was called to the failure of the system of arbitration under the Act of 1883. It was said that "the inspectors found that having no guide as to what constituted tea unfit for use they were obliged to decide according to their own impressions of the moment—necessarily vague—which resulted in the shutting out of a tea to-day which would be admitted to-morrow." Again, "As many teas fit for use may have some quantity of adulterated or exhausted leaf, it is impossible to determine exactly where the line should be drawn" (see copy Senate Report printed in Appendix).

Then, after stating that "the public of the United States are now drinking the lowest average grade of tea ever before known," the remedy proposed is to constitute a committee, to be appointed by the Secretary of the Treasury, "whose duty it shall be to determine the lowest grade of tea fit for use, purchase enough of same for a standard, say five packages of each kind, to enable all importers and inspectors to possess a sample for their guidance." The result aimed at was to establish a physical standard and to compel the importation and sale of a higher grade of teas than was then in use. This was to be done, according to the bill before Congress, by excluding all tea, and by then having the Secretary of the Treasury, upon the recommendation of the board, fix standards of such teas as might be admitted. Under the bill as drawn it was not necessary to provide for the exclusion of any kind of tea, but some provision was required for the admission of teas. The committee was willing to lodge with the Secretary, on the recommendation of the board, the

absolute discretion as to what that requirement should be.

But it may be said that there is an implied requirement that the secretary and the board should exclude only teas of the *minimum* purity and quality which are fit for consumption; that the law did not intend that they should exclude pure tea of good quality. The answer to this is that the statute did not limit the exclusion to the minimum of purity and quality. The manifest intention was to trust the fixing of the standard absolutely to the board and the secretary. The purpose was that the standard itself should be the rule and not be subject to attack as not complying with any other rule. It was not proposed that the action of the board and secretary should be open to inquiry or correction. Just the opposite was the intention. Undoubtedly it was believed that the board and the secretary would act wisely and reasonably. But this belief did not limit or control the absolute discretion which the statute granted.

(6.) An action was brought (*Buttfield* v. *Bidwell*, 96 Fed., 328, C. C. A.) to restrain the Collector Examiner and Tea Board of General Appraisers from excluding his teas upon the "legal theory that within the true meaning of the act of Congress no teas are prohibited from importation which are equal to the standards which had been established in purity, wholesomeness and fitness for consumption and freedom from adulteration or extraneous matter, notwithstanding they are not of the quality in other respects required by the standards." The constitutionality of the law was not raised in that action. It was assumed that the Secretary had the power to establish standards. The plaintiff's contention was that the word "quality" was to be construed as having reference to the purity, wholesomeness and genuineness of the tea and not to its taste and flavor, and that it was, therefore, a word of limited signification, and did not

authorize the exclusion of teas upon the ground of general excellence. In this contention he was unsuccessful. The Judge of the Circuit Court said:

> "By the insertion of the word 'quality' in the statute, Congress intended to cover more than mere purity and unwholesomeness. So interpreted, the statute is in entire harmony with the drift of recent legislation, which, to a continually increasing extent, relegates to governmental determination and control matters which have always hereto fore, in this country, at least, been left to the disposition of the individual citizen, or to the operation of natural laws" (*Buttfield* v. *Bidwell*, 94 Fed. R., 126).

The Circuit Court of Appeals said that the construction of the act claimed by the plaintiff would eliminate the word "quality," and that the history of the legislation showed that the word "quality" was introduced for the purpose of making the act more stringent than the previous Act of 1883, which excluded unwholesome teas, and that this appeared from the report of the Senate Committee, the language of which the Court refers to, pointing out that the standards fixed by the Secretary of the Treasury were to constitute the controlling feature of the new enactment. The Court says:

> "It was amended in the Senate by inserting the word 'quality' between the words 'purity' and 'fitness for consumption' wherever they occurred in the house bill. The amendment evinces the intention of the Senate to authorize the adoption of uniform standards by the Secretary of the Treasury, which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably or possibly so because of their inferior quality."

The power of the Secretary with regard to the establishment of standards was not before the Court. What the Court was called upon to decide

was whether the examiner in testing the teas could exclude them because, though pure, wholesome and genuine, they were not equal in taste, flavor and excellence to the standards, and the Court held that he might. The opinion does not indicate that the Secretary was required to establish standards of admission upon any rule. He was *authorized* to adopt standards but he was not *required* to adopt them, according to any rule.

In the opinion reference is made to the circumstance that by the Act of 1883 tea "adulterated with spurious and exhausted leaves, or containing such an admixture of deleterious substances as to make it unfit for use was prohibited; and exhausted leaves were defined to include any tea which had been deprived of its proper quality, strength or virtue by steeping, infusion, decoction or other means." But in the case then before the Court it was proved without denial or controversy that the teas there in question were genuine, contained no exhausted leaves and were free from extraneous matter and this was assumed in the opinion and the decision was that the examiner had the right under the statute to exclude teas which though equal to the standards in "purity, wholesomeness and fitness for consumption *and freedom from adulteration and extraneous matter*," did not equal the standard in "quality." "Quality," therefore, was construed to mean something more than a mere exhaustion of the leaf as defined by the Act of 1883.

It is also said in the opinion that the intention was to authorize the Secretary to adopt standards adequate to exclude the lowest grades of tea which were or might possibly be unfit for consumption. The words "lowest grades" are not found in the act, but are taken from the report of the Senate committee, and (see *ante*, p. 26) whatever may have been in the minds of the committee this mental attitude found no expression in the bill as passed. Moreover, the highest grades of some classes of

tea may be unfit for consumption on the basis of quality, while the lowest grades of other classes of tea ought to be admitted on the same basis. The mere grading of the tea does not furnish a rule of exclusion unless it is also provided at what grade the line must be drawn. The Exhibit No. 8 in *Butfield* v. *Stranahan* (p. 19) shows that the finest grades of Fychow and Wenchow teas were excluded.

The opinion referred to states that the amendment of the statute by the introduction of the word "quality" showed an intention to authorize the adoption of standards which would be adequate to exclude the lowest grades of tea "whether demonstrably of inferior purity or unfit for consumption or presumably or possibly so because of their inferior quality." What do the words "presumably or possibly so because of their inferior quality" add to the statutory words "unfit for consumption"? Suppose the Secretary fixes a standard which excludes all country green teas, except the highest grade, and suppose his right to fix that standard could be challenged as not being within the rule prescribed by the statute, and he answered that in his opinion all the other grades are possibly unfit for consumption because of their quality, would not that answer be conclusive? Moreover, standards "*adequate*" to exclude teas unfit for consumption might also exclude other grades unquestionably fit for use, as instanced in the Standard No. 7 referred to in the two cases here on review. The word "adequate" does not fix a rule or place any limit on the powers of the Secretary.

This opinion confirms the conclusion that there is no other rule of admission of teas to be found in the statute than the uncontrolled discretion of the Secretary.

(7.) In the *certiorari* proceeding, above referred to, Mr. Justice Bradley, in an opinion written after the opinion of the Circuit Court of Appeals was announced, construing the act, said:

> "In plain terms, the statute requires the Board of Tea Experts, whose appointment is

provided for, to prepare and submit to the Secretary of the Treasury standard samples of tea, and requires the Secretary of the Treasury upon the recommendation of the Board to fix and establish uniform standards, and to deposit in the custom houses of various ports of the country, duplicate samples of the standards. The standard to be establish is a sample of tea, not a descriptive regulation, and the question whether the tea brought into the country comes up to the standard, must be answered by a test that demonstrates the fact to the senses.

"The duty of the Board of seven members, each of whom must be an expert in teas, is not to hear the importers, or to pass upon the merit of the teas that they severally handle, not to examine witnesses or to take testimony, but, using their expert knowledge, with the aid of their senses, to select samples of tea that in their judgment are of the purity, quality, and fitness for consumption *that justify their use as standards*.

"The duty of the Secretary of the Treasury is to fix and establish standards upon the recommendation of the Board, and to cause duplicate samples of such standards to be placed in the several custom houses. His function appears to be executive.

"The functions of the Board are not judicial.

"The members are selected for their expert knowledge, they act upon their own inspection, and are at liberty to gain such information as they may require for the performance of their duty in any way, and from any available source. The examination of witnesses, or the hearing of parties interested in the subject, or to be affected by the conclusions of the Board, is not contemplated by the statute.

"Under Article 7, section 8, clause 3 of the Constitution of the United States, giving to the Congress power to regulate commerce with foreign nations, the power in that body *to say just what teas, or whether any teas shall be imported into the United States, cannot be questioned. It is part of the political power committed to it.*

"The fixing of standards of tea that may

> be imported would seem to demand specially equipped agents, such as the act in question authorized the Secretary of the Treasury to employ in aid of the duty imposed upon him. The performance of that duty by him, and the performance by the Board of its statutory duties *involved the exercise of a part of the Government power*, and the acts done are not subject to review by the courts."

The fixing of the standard is here declared to be the exercise of governmental power beyond the control of the courts, an absolute power, lodged with the Secretary and the Board.

The constitutionality of the statute was not raised in that proceeding. The application was based upon the statute itself, and proceeded upon the assumption that the law was constitutional.

From this review of the facts attending the enactment of the law and the construction placed upon it by the Courts the conclusion is inevitable that the act excludes all teas from import except such as are equal to standards fixed by the uncontrolled will of the Secretary of the Treasury on the recommendation of the Board.

2. *The power to regulate commerce with foreign nations and between the States is subject to such limitations as are prescribed by the Constitution and its amendments.*

The power to regulate commerce is subject to the limitations imposed by that instrument, and, among others, to those contained in the Fifth Amendment.

This was recognized by Chief Justice Marshall when this Court was first called upon to consider the scope of the commerce clause. He said: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution" (*Gibbons* v. *Ogden*, 9 Wheat., 196). And it has been repeatedly applied whenever proper occasion has arisen.

The power to regulate commerce is not an end in itself. It is an instrumentality which may be employed for many distinct purposes (Cooley *v.* Port Wardens, 12 How., 310, 319, Curtis, *J.*). In scrutinizing its operation attention must, therefore, be given to the purpose for which it is employed, and the restraints which are imposed upon it by constitutional limitations are such as are called into operation by the character of the legislation.

Thus, Congress may, under this power, improve the harbors and navigable rivers of the country, but if in the exercise of that power it deems it necessary to take private property, then it must proceed subject to the limitations imposed by the Fifth Amendment, and can do so only on payment of just compensation.

> *Monongahela Navigation Co.* v. *U. S.*, 148 U. S., 336.

So, when this power was exercised to prevent unjust discrimination in tariff rates by common carriers engaged in interstate commerce, it was held that in the enforcement of the provisions of that law a witness was protected by the constitutional provisions contained in the Fifth Amendment from being compelled to disclose evidence of a criminating character.

> *Councilman* v. *Hitchcock*, 142 U. S., 547.
>
> *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447.

Again, when this power was invoked to protect trade and commerce against unlawful restraints and monopolies (Anti-Trust Law, July 2, 1890), and the right of railroad corporations to enter into a joint traffic agreement was brought before this Court under that law, this Court, speaking through Mr. Justice Peckham, in *U. S.* v. *Joint Traffic Association* (171 U. S., 503, 505), said:

> "The power to regulate commerce has no limitations other than those prescribed in the

> Constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guaranties which are also placed in the Constitution or any of the Amendments to that instrument (citing the cases above cited).
>
> "Among these limitations and guaranties counsel referred to those which provide that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation. The latter limitation, we think, is plainly irrelevant. As to the former, it is claimed that the citizen is deprived of his liberty without due process of law when by a general statute he is arbitrarily deprived of the right to make a contract of the nature herein involved."
>
> See briefs of R. W. De Forest and David Willcox and Mr. E. J. Phelps, filed in that case.

Again, when, in the interest of public morals, Congress undertook to regulate commerce by prohibiting the transmission of lottery tickets from one State to another by express or otherwise (Act of March 2, 1895), this Court having reached the conclusion that lottery tickets were articles of commerce, sustained the validity of the law and met the objection that its decision might justify an interference of the plenary power of Congress to prohibit or regulate interstate commerce beyond constitutional restrictions in these words:

> "It is said, however, that the principle that in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity or thing of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when

> we must do so. The present case does not require the Court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. We may, however, repeat in this connection what the Court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument."
>
> Lottery Case, 188 U. S., 321, 362.

Indeed, any pretence that the power to regulate commerce in whatever direction and to whatever purpose applied is not subject to the restriction of the Fifth Amendment is dissipated by a reference to familiar history. The first ten amendments had their origin in the danger which was apprehended that the powers that might be exercised under the Federal Constitution were not subject to the checks and limitations for the protection of liberty and property which had been insisted upon and vigorously proclaimed in the bills of rights and constitutions of the several States They were passed as the preamble recites because a number of the States at the time they adopted the constitution "expressed a desire in order to prevent misconstruction and abuse of its powers that further declaratory and restrictive clauses should be added." Hence the prompt adoption of these amendments:

> "The rights preserved by the Fifth Amendment were deemed so vital to the safety and security of the people that the absence from the constitution adopted by the convention of 1787 of express guaranties of them came very near defeating the acceptance of that instrument by the requisite number of States. The constitution was ratified in the belief and only because of the belief, encouraged by its leading advocates, that immediately upon the organization of the government of the Union, Articles of Amendment would be submitted

> to the people recognizing these essential rights of life, liberty and property which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country."
>
> Harlan, *J.*, in *O'Neil* v. *Vermont*, 144 U. S., 323, 371.

Can it be doubted that a regulation of commerce which should deny to certain citizens the equal protection of the laws would be unconstitutional because inconsistent with these principles of equality and liberty which are involved in and form the essence of the Fifth Amendment, although that amendment does not contain, as does the Fourteenth, a specific prohibition upon legislation which denies to any person the equal protection of the laws? But if this be so, how can it be successfully claimed that the power to regulate commerce with foreign nations is not subject to every guaranty, expressed or implied, embodied in the Fifth Amendment?

3. *When the power to regulate commerce is employed for purposes of police regulation it is subject to the restraints of the Fifth Amendment.*

(i.) Since "the power to regulate commerce embraces a vast field containing not only many but exceedingly various subjects quite unlike in their nature" (Cooley *v.* Wardens, *supra*) each subject must have its appropriate constitutional limitations. When political, international and other interests which it is not now necessary to attempt to classify are involved, the encroachments upon individual liberty and property may, be extraordinary and far reaching. In such instances it may be that even a temporary prohibition of all foreign commerce is consistent with the natural liberty of trade secured by the Fifth Amendment. It was so held when Congress, in view of the danger to our commerce and threatened hostilities, passed the Embargo Laws (Embargo Act of 1807).

The question was presented in *U. S.* v. *The William*, 2 Hall L. J., 255; 28 Fed. Cas., 614. The Judge who wrote the opinion in that case (Mr. Justice Davis, District Court of Mass.), reached the conclusion that the act was not in contravention of other constitutional provisions in view of the necessities for such legislation, upon which Congress was called upon to act, and in view of the conclusion that from the very nature of their provisions the acts could not be destined to be perpetual, but were intended to meet a temporary emergency (see Von Holst's Constitutional Hist., Vol. 1, pp. 204, 211, and note citing extract from letter of Judge Story).

See Story on Const. Law.

We are not, however, now concerned with legislation which relates to international and political matters, or to extreme cases. This act purports to deal with health and the welfare of society in the ordinary conduct of life. It is in the nature of a police regulation. It is entitled "An Act to Prevent the Importation of Impure and Unwholesome Tea." The report of the Senate Committee shows that the purpose of the legislation was to regulate the sale and consumption of teas. In *Sang Lung* v. *Jackson*, Mr. Justice DeHaven said it was enacted to prevent the introduction into the United States of impure and adulterated tea.

It is analogous to an inspection law, since it has been decided that such laws may be made applicable to articles of import as well as to those of export (*Potapsco Guano Co.* v. *North Carolina*, 171 U. S., 345), although no provision is made for identification of grade or character of goods by marks and numbers. Such laws are properly classified as exercises of the police power (*Cooley Cons. Lim.*, 6th Ed., pp. 720, 721).

The statute in question being in its nature a police regulation, although the power to enact it grew out of and was incidental to the power to regulate commerce, it is subject to the restraints of the Fifth

Amendment to the same extent that similar State legislation is to the Fourteenth Amendment.

It is not necessary to argue that the rights of liberty and property secured by the Fifth Amendment to citizens of the United States are no less than those which are secured to the citizens of the several States by the Fourteenth Amendment; nor that they are not less binding upon congressional legislation than the Fourteenth Amendment is upon State legislation.

(2.) Reference to the history of the decisions of this Court relating to the exclusiveness of the power of Congress under the commerce clause, is not without interest in its bearing upon this point. The question whether the power to regulate commerce was exclusively with Congress, or whether the several States, in the absence of Congressional legislation, might enact police laws which, in effect, regulated commerce, was brought before this Court during its early history (Wilson *v.* The Blackbird Creek Marsh Co., 2 Peters, 245; New York *v.* Miln, 11 Peters, 182; the License Cases, 5 How., 504), and it was apparent that if the commerce clause was held to be operative to exclude all State legislation affecting commerce, much of the police power reserved to the States would be held in suspense as not being within the sphere of State action, and as not having been acted upon by Congress (see opinions of Woodbury, *J.*, in the License Cases, *supra*, and in the Passenger Cases, 7 How., 559). Without attempting to refer to the numerous authorities in which this subject has been considered, it may, we think, be confidently asserted as the final outcome that the several States may, in the absence of national legislation, pass police laws upon many subjects which do, in effect, regulate commerce (Southern Steamship Co. *v.* The Port Wardens, 6 Wall., 33; Bowman *v.* Chicago, &c., Ry., 125 U. S., 489; N. Y., N. H. & H. R. Co. *v.* State of New York, 165 U. S., 631; Reid *v.* Colorado, 187 U. S., 137).

No one, we think, can doubt that in the absence of a Federal statute prohibiting the importation of unwholesome tea the State of New York might pass an act prohibiting such importation as a police regulation. But under the guise of such an enactment could it destroy the fundamental right to trade in wholesome teas and substitute in its place a mere privilege dependent upon the will of an individual?

When Congress entered upon the same domain and excluding State legislation undertook to pass this law, while of course it was not bound by the provisions of the New York Constitution, or by the decisions of its Courts, was it not restrained by the fundamental guaranties of liberty and property which are common to Federal as well as to State legislation? If not, we have the anomaly of essential constitutional rights secured to the citizens of the States so long as powers affecting commerce by police enactments remain with them, abrogated when Congress exercises the same power under the Federal Constitution, although that instrument was ordained to secure more effectually "the blessings of liberty." In short, a power exercised to-day within defined limits by the States under the protection of civil liberty may to-morrow be exercised by Congress within the same limits free from those protections. This is a conclusion which we think this Court will be slow to adopt.

(3.) This argument does not ignore the comprehensive character of the grant of power to "regulate commerce with foreign nations" as shown in the historical derivation of that clause. It may be conceded that this was one of the powers of sovereignty deemed to be exclusively within the control of Great Britian during the Colonial period, and it cannot be doubted that British regulations of our foreign commerce were restrictive and sometimes prohibitory.

It was among the injuries and usurpations on the part of the King of Great Britain enumerated in the Declaration of Independence that he had combined to

subject the colonists to a jurisdiction foreign to our Constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation cutting off our trade with all parts of the world.

The Articles of Confederation gave the United States, in Congress assembled, the sole and exclusive power of regulating the trade and managing all affairs with the Indians not members of any of the States, and also the exclusive right of entering into treaties and alliances "provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any specie of goods or commodities whatsoever" (Art. 9).

From these and other circumstances it may be urged that when the power to regulate commerce with foreign nations was by the Constitution conferred by the people of the United States upon Congress, Congress acquired a dominion over foreign commerce similar to that which had theretofore been exercised by the King and Parliament of Great Britain, or preserved to the several States, and as a conclusion from this proposition, it may be urged that whenever Congress attempts to regulate foreign commerce it has absolute and autocratic powers, unrestrained by the constitutional guaranties for the protection of liberty and property.

But the conclusion does not follow from the premise. Because certain powers more or less absolute may be exercised by Congress over foreign commerce, it does not follow that every exercise of power over foreign commerce is, therefore, absolute and arbitrary. The grant of power, though general and plenary, must in its application be limited by the purpose and end to be attained.

The primary object of the grant to Congress of the power to regulate commerce with foreign nations was to vest in the common government of all,

the power, by uniform regulations, to counteract the powers of foreign countries hostile alike to all. Doubtless the first thought was protection by combination against foreign intrigue or attack upon the commerce of the States, and for this purpose the States were willing to concede political powers akin to those which had been customarily exercised by independent and sovereign nations. But when this clause was introduced into the Constitution, establishing complex relations between the several States and the Federal Government, with enumerated powers restrained by express guaranties of personal liberty and property, it was not compatible with such a system that arbitrary powers conferred to meet foreign relations should be used in the government of the people as between themselves in their domestic relations.

But the power to regulate commerce, as we have already said, covers a vast field containing various subjects unlike in their nature. "It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish and to descend to the most minute directions, if it shall be deemed advisable, and that to whatever extent ground shall be covered by these directions, the exercise of State power is excluded." (Cooley's Cons. Lim., 4th ed., p. 732; *Gloucester Ferry Co.* v. *Penn.*, 114 U. S., 196, 215).

It is a matter of common observation that legislation based upon the commerce clause has within comparatively recent times extended over a great diversity of subjects affecting internal as well as external interests. Observe the case now before the Court. Tea is an exotic; the domestic trade in it depends upon importation. This act, therefore, affects trade in every part of every State and Territory. It does this, not for the protection, maintenance or welfare of the National government, or for the public safety, but avowedly for the protection of the health and welfare of the individual. It touches

his comfort and welfare in his private relations. Similar legislation may in like manner affect trade in every commodity of foreign production. If we are to apply the absolute and arbitrary powers which it may be assumed are for some purposes committed to Congress in the regulation of foreign commerce to this wide field of industry and happiness, then those relations of government which come closest and nearest the individual have been by our form of government left outside of the protection of constitutional guaranties of liberty. Such a conclusion is as repulsive as it is unnecessary. A just discrimination as to the subjects of regulation indicates that certain of the powers which may be exercised over foreign commerce are inherently of such a character as to be exclusively political and not reviewable by the courts; but arbitrary powers, though sometimes indispensable, can never, under our system of government, be the rule, they must be the exception, and when Congress, for the purpose of protecting the health and welfare of the citizen, enacts a law relating to trade in tea, there cannot be in the exercise of this function of government anything which calls for or justifies arbitrary or despotic action in disregard of the ordinary rights of person and property.

Unless this be so it is impossible to resist the force of the contention that general police power being exclusively within the control of the States, Congress cannot exercise such general police powers under the power to regulate commerce.

Lottery Cases, 188 U. S., 364, dissenting opinions.

License Cases, 5 How., 594, 599.

(4.) This doctrine may be somewhat more easily accepted when it is applied to interstate commerce, but the principle is the same. Is it within the competency of Congress to prohibit trade between the States in a wholesome article of commerce, or to place such interstate commerce in the arbitrary control of

an individual or of a board? No Court, no publicist has maintained that it could (See address of J. Randolph Tucker on the Regulation of Interstate Commerce, 4 Ry. & Corp. L. J., 290). Why not? The natural rights of the citizen to trade are the same in each instance. It is only because the powers granted to Congress in the case of foreign commerce include control over subjects which are not embraced in interstate commerce. All the powers of Congress are trust powers, to be used for and not against the liberties of the people. However extensive and arbitrary the powers may be which the people have given to the central government to be used against foreign peoples, it cannot be successfully contended that they intended to give the same extensive and arbitrary powers to Congress to be used against themselves.

In the Joint Traffic Association case the contract in question was assailed as being in restraint not only of domestic but of foreign trade. Suppose that the argument had prevailed that Congress had no power to prohibit the enforcement of the contract because it interfered with rights under the Fifth Amendment, would this Court have held the contract for that reason void as to interstate commerce, but valid as to foreign commerce, because the regulation of foreign commerce may be arbitrary, or if we may imagine a case resembling the Lottery case, where, however, Congress had prohibited the importation from abroad and also the transhipment between the States of a wholesome article of commerce, and this Court had held that that was a violation of personal rights under the Fifth Amendment, would it be reasonable to hold that the law was invalid as to interstate transportation but valid as to foreign import, and if so, upon what substantial ground that would appeal to the good sense of mankind could such a ruling be made?

(5.) But however extensive the powers of Congress may be over commerce with foreign nations, the laws which it makes for carrying into execution

these powers must be "necessary and proper" (Constitution, Art. 1, Sec. 8, Par. 18). Grant that it may prohibit the importation of all tea. The intention of this act was not to prohibit the importation of all tea, but to restrict the importation, and in carrying into effect this power of restriction Congress must use means which are constitutional. It cannot subordinate the right of the citizens to the will of one man, because that is to substitute slavery for freedom, and to violate not only the letter but the spirit of the Constitution from the first word to the last, and such legislation cannot be "proper."

In the often quoted language of Chief Justice Marshall, in McCulloch *vs.* Maryland, 4 Wheaton, 421, holding that this clause is not a limitation upon the powers of Congress, but an expression of necessarily implied power, "Let the end be legitimate, let it be within the scope of the Constitution, all means which are appropriate, which are plainly adapted to that end, which are not prohibited, *but consistent with the letter and spirit of the Constitution are constitutional.*" The word "proper" is here used with regard to the relation between the sovereign and the people, fixed by the Constitution itself. The word means, says Judge Story, "*bona fide* appropriate to the end;" or in the words of Chief Justice Marshall, "appropriate plainly adapted" to a constitutional and legitimate end and "not prohibited but consistent with the letter and spirit of the Constitntion" (Chief Justice Chase, Legal Tender Cases, 12 Wall., 573).

Why, we ask, should Congress have the power to disregard for police purposes personal rights of liberty and property which the States may not disregard for the same purposes? What wise or beneficent end is to be attained by establishing such a distinction? Will it conserve the interests of the nation or its citizens that Congress shall have arbitrary powers when, under the guise of regulating commerce, it enacts a police regulation, while such

powers are denied to the States with whom the direct exercise of the police power is lodged?

(6.) It is not necessary to attempt a definition of the police power. Concededly, regulations which have to do with public health and with the protection of society against imposition and fraud are embraced in that term. In whatever direction it is exercised, the police power may interfere with the unrestricted enjoyment of liberty and property. In return for the benefits of organized society the citizen consents to these restrictions, but it is evident they must have a limit. The complete surrender of liberty and property for the safeguarding of liberty and property would be a solecism. The point at which the demands of government under the police power are restrained by the paramount constitutional guaranties of liberty and property cannot be fixed, but must be left to be determined by the process of exclusion, as applied to particular cases.

Under our form of government the question whether that limit has been overreached in a particular instance must always be a judicial question. This proposition, although now supported by the weight of authority, has not at all times met with approval. In *Powell* v. *Penn.*, 127 U. S., 678, Mr. Justice Harlan said:

> "If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing oleomargarine as an article of food their appeal must be to the Legislature, or to the ballot box, not to the judiciary."

This expression was guarded by the language used by the same Judge in the subsequent paragraphs of the opinion. Unless it is so qualified it will be difficult to reconcile it with principle or with the later decisions of the Court. If an act is unnecessarily oppressive is not that a deprivation of liberty? Can there be a better definition of

the deprivation of liberty than unnecessary oppression, and if when by legislative enactment a citizen is deprived of liberty his only redress is by appeal to the Legislature or to the ballot box, what becomes of constitutional protections? Is not the Legislature thereby constituted the paramount authority, and may we not ask, with Chief Justice Marshall, "To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?" (*Marbury* v. *Madison*, 1 Cranch, 137, 176).

That the words of Mr. Justice Harlan quoted above were not intended to deny the power of the judiciary to declare police regulations unconstitutional, because unnecessarily oppressive and violative of civil liberty, appears from his language in the same opinion:

> "Nevertheless, if the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the State Legislature, under the pretense of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty or property, or other rights, secured by the supreme law of the land."

The same idea is expressed even more emphatically by the same learned Justice in *Smyth* v. *Ames*, 169 U. S., 468:

> "The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This protection and duty of the judiciary dis-

> tinguishes the American system from all other systems of government. The perpetuity of institutions and the liberty which is enjoyed under them depend in no small degree upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

Speaking of the power of the courts to pass upon the constitutionality of police legislation, Mr. Justice Brown, in *Lawton* v. *Steele*, 152 U. S., 133, said:

> "The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

It was justly said in the case of *Holden* v. *Hardy*, 169 U. S., 366, that the police power cannot be put forward as an excuse for oppressive and unjust legislation.

So, in *Cotting* v. *Goddard*, 183 U. S., 83, 86, where the Kansas stockyard law was declared unconstitutional, the opinion of the Court, announced by Mr. Justice Brewer, based the illegality of the legislation not merely upon the ground that the Stockyard Company was denied the equal protection of the law, but also upon the ground that the statute by its necessary operation deprived the company of its property without due process of law. While the majority of the Court did not concur in the latter conclusion, yet it did in the former.

Finally, the doctrine was announced with *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 558, that "as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes to the contrary notwithstanding, a statute of a State even when avowedly enacted in the exercise of its police power must yield to that law" (Harlan, *J.*).

This opinion is confirmed by the latest and best considered opinions of the State courts.

Noel v. *The People*, 187 Ill., 587;
Ritchie v. *The People*, 155 Ill., 98;
Ruhstrat v. *The People*, 185 Ill., 133;
Gillespie v. *The People*, 188 Ill., 176;
Bessette v. *The People*, 193 Ill., 334;
State v. *Chicago, M. & St. P. R. Co.*, 68 Minn., 381;
In re Jacobs, 98 N. Y., 98;
People v. *Marx*, 99 N. Y., 377;
People v. *Gilson*, 109 N. Y., 389;
Waters v. *Wolff*, 162 Pa.;
Am & Eng. Enc. of Law, 2nd ed., Vol. 22, p. 937.

Some enlightment upon this subject may be found from the history of the tariff rate litigation in this Court.

In *Munn* v. *Ill.*, 94 U. S., 113, Mr. Chief Justice Waite remarked of the power of the State legislature to regulate rates for warehousing: "We know that this is a power which may be abused, but that is no argument against its existence. For protection against abuses of legislature the people must resort to the polls, not to the Court"; but after the experience of the "Granger" legislation, this Court, through the same learned Judge, in the Railroad Commission cases (116 U. S., 307 [331]) declared that the power to regulate was not a power to destroy and "limitation is not the equivalent of confiscation," and still later this Court reached the conclusion upon that subject for which we are contending here that "there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States as

depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

Covington, &c., Turn Pike Co. v. *Sandford*, 164 U. S., 578.

4. *The Act violates the Fifth Amendment, because it permanently deprives the plaintiff and other citizens of their right to trade in a beneficial and wholesome article, except at the uncontrolled will of the Secretary of the Treasury and a board appointed by him.*

(1.) The right to trade is a natural right, which is protected by the Fifth Amendment. In the opinion from which we have quoted above (*Sang Lung* v. *Jackson*, *supra*, p. 19; *Cruikshank* v. *Bidwell*, *supra*, p. 21), it is said that no citizen of the United States has a *vested* right to import tea. The phrase is we think inappropriate. The nat ural right to trade lies back of rights vested by law or contract. It exists because it is God-given. Just governments are established to preserve not to create it. There never can be any justification for an enactment which permanently prohibits a useful industry. Such an enactment is not within the domain of law; it is a mere act of despotism.

In the leading case of Mitchell *v.* Reynolds (1 P. Williams, 181, 188) it is said that the language of Magna Charter, "'Nullus liber homo, &c., desscisitur de libero tenessiento vel libertatibus vel liberis consue ludembus, suis, &c.,' extend to freedom of trade."

But if it be self-evident that the Legislature, whether State or Federal, may not permanently deny to a citizen the right to employ his energies in a useful trade it is still more apparent that it may not by such absolute prohibition and its arbitrary relaxation place the right so to trade within the uncontrolled will of an individual or

board. This arises from the nature of free government.

In the eloquent language of Mr. Justice Mathews in *Yick Wo* v. *Hopkins*, 118 U. S., 356:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'May be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

In that case the right to carry on the laundry business was made dependent upon the consent of the

Board of Supervisors, unless the laundry was located in a building constructed of either brick or stone. Any one could conduct a laundry in a brick building, but only those to whom the board might choose to give consent could carry on the same business in a wooden building. The discretion to grant that consent was arbitrary and unregulated. It differed as the case at bar differs from the ordinary regulations of various industries by license or permit in that there were no requirements with which, if one complied he was lawfully entitled to the consent of the Board of Supervisors (*Gundling* v. *Chicago*, 177 U. S., 183, 187).

In commenting upon this case in *Crowley* v. *Christensen* (137 U. S., 86), Mr. Justice Field said "The ordinance therein held invalid vested an uncontrolled discretion with reference to a business harmless in itself and useful to the community." For this reason it was held unconstitutional as in violation of the Fourteenth Amendment.

The Yick Wo case was not so severe as the case at bar. A Chinaman might build a brick house and would thereby become entitled to conduct a laundry, but no American citizen can upon any terms acquire the right to import wholesome teas, even as a curiosity, without the consent of the Secretary of the Treasury. Nor is the force of that decision weakened by the circumstances that a municipal ordinance was then under consideration, while here we have to do with a congressional statute. The ordinance was stricken down by this Court because it was repugnant to the Fourteenth Amendment and not because it was unreasonable or unwarranted in the exercise of the powers of the Municipal Assembly. It was weighed here in the same balance in which we are asking the Court to weigh this enactment. Whether the offending measure be a municipal ordinance or an enactment of the National Legislature it must yield to the supremacy of the Constitution.

In Noel *v.* The People (187 Ill., 587) an act to reg-

ulate the practice of pharmacy in the State of Illinois was under review. Among other things, it provided that the Board of Pharmacy might, in their discretion, issue permits to persons, firms or corporations engaged in business in villages or other localities empowering them to sell the usual domestic remedies and proprietary medicines under such restriction as the Board of Pharmacy might deem proper. The Supreme Court held the act unconstitutional among other things for the reason that the discretion conferred was uncontrolled and arbitrary. The Court said:

> "The board is thus authorized to confer a privilege upon one person, firm or corporation and deny the same privilege to any other person, firm or corporation, and is not required to be governed in doing so by any fixed rules or regulations, but may be moved thereto only by its own caprice or favoritism. Laws thus conferring discretionary and arbitrary powers upon statutory officials are not only invalid for the reason already stated, but amount in effect to a delegation by the Legislature of its legislative functions to the board or officials in question."

A forcible illustration of the application of this principle is found in the case of the *People* v. *Warden*, 157 N. Y., 116. A statute of the State of New York prohibited any person from selling a passage ticket on any vessel or railway train unless authorized by the agents of the owners or consignees of the vessel or by the company, with other restrictions. This act was held unconstitutional as prohibiting a business which was neither dangerous nor injurious to the public, except upon the arbitrary consent of the individuals designated by the statute.

Another illustration is found in the case of *Sioux Falls* v. *Kirby*, 25 L. R. A., 621. In that case an ordinance in effect prohibited any person from erecting a building of any description upon his land, ex-

cept upon obtaining a permit from an inspector that the building complied with the requirements of the law, but the ordinance did not provide what the requirements were. The ordinance was held unconstitutional upon the principal announced in *Yick Wo* v. *Hopkins*.

To the same effect is the language of the Court in *Live Stock Dealers* vs. *The Crescent City Live Stock, &c.* 1 Abb. U. S., 399; Fed. Cas., No. 8408;

> "No proposition is more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful and industrial pursuits, not injurious to the community, as he may see fit, without unreasonable regulation or molestation. There is no more sacred right to citizenship than the right to pursue any lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

This principle is nowhere more forcibly stated than by Mr. Justice Rapallo in *People* v. *Marx*, 99 N. Y., 377:

> "Among these (constitutional safeguards) no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit (Live Stock Ass'n *v.* The Crescent City, &c., 1 Abb., 398; Slaughter House Cases, 16 Wall., 106; Corfield *v.* Coryell, 4 Wash., 380; Matter of Jacobs, 98 N. Y., 98; 50 Am. Rep., 636). The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. In the language of Andrews, *J.*, in Bertholf *v.* O'Reilly, 74 N. Y., 515; 30 Am. Rep., 323, the right to liberty embraces

> the right of man 'to exercise his faculties and to follow a lawful avocation for the support of life,' and as expressed by Earl, *J. In re* Jacobs, 98 N. Y., 98, 'one may be deprived of his liberty, and his constitutional rights thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.' "

Without multiplying citations, we think it cannot be successfully contended that the right of a citizen to carry on a lawful business can be placed under the arbitrary and uncontrolled will of an individual or board.

Cicero Lumber Co. v. *Cicero*, 176 Ill., 9; 42 L. R. A., 696.
Harmon v. *Ohio*, 66 Ohio St., 249; 58 L. R. A., 618.
Noel v. *The People*, 187 Ill., 587.
Colon v. *Lisk*, 153 N. Y., 188, 197.
In re Grice, 79 Fed., 627.
State v. *Ashbrook*, 154 Mo., 375.
N. Y. S. U. Co. v. *Dept. of Health*, 61 App. Div., 106.

(2.) This position is not inconsistent with anything decided by this Court under the Alien Exclusion laws (*Lem Moon Sing* v *U. S.*, 158 U. S., 538; *Chae Chan Ping* v. *U. S.*, 130 U. S., 581; *Nishimura Ekiu* v. *U. S.*, 142 U. S., 651; *Fong Yue Ting* v. *U. S.*, 149 U. S., 698; *Wong Wing* v. *U. S.*, 163 U. S. 228; *U. S.* v. *Wong Kim Ark*, 169 U. S., 649), or with the legislation making the decision of immigration or custom officers against the right of aliens to enter the country final (*Lem Moon Sing* v. *U. S.*, 158 U. S., 538).

The Alien Exclusion Acts do not rest upon the

power of Congress to regulate commerce, but upon the sovereign power to exclude all aliens from national territory, which is incident to every independent nation. Similar laws applicable to citizens would be unconstitutional (*U. S.* v. *Wong Kim Ark*, 169 U. S., 649).

(3.) Nor is this position inconsistent with the cases which sustain police restrictions and prohibitions upon immoral, harmful and dangerous pursuits, or with the proper regulation of professions, trades and industries, although innocent and beneficial.

We concede the right to prohibit or restrain pursuits which are harmful or which have an immoral tendency. Cases relating to the prohibition or restriction of the sale of liquors and poisonous drugs and other deleterious substances are of this class. Innocent and beneficial pursuits may also be regulated under the police power, and it has been urged that the means of regulating certain professions and trades sanctioned by the courts are often not essentially different from those employed under this statute. If a board may be authorized to fix, by an examination paper or otherwise, a standard of qualification which one must reach before he can work as a plumber, then it is asked why may not an individual or board be empowered to fix a standard of purity, quality and fitness for consumption of teas to be imported? There is an apparent but no real resemblance between the two cases. Requisite fitness and skill are a part of the necessary equipment for the practice of certain pursuits. This is not made so by law; it is a part of the existing order of things which the law recognizes.

At common law a man is held to warrant impliedly that he is competent to perform the service which he holds himself out as competent to perform, and if one employing him suffers damages by reason of his want of skill, he is liable therefor. The statutory provisions are intended to safeguard the

community against the want of skill which is actionable when resulting in damages.

The rules adopted by any board for the admission of persons to such pursuits must be adapted to and be suitable for the determination of such fitness and skill. Requirements which have no such relation to such calling or profession, or which are unattainable by reasonable study and application, or which are arbitrary, deprive one of his right to pursue a lawful avocation, and statutes permitting such requirements are invalid.

Dent v. *State of W. Va.*, 129 U. S., 114.
Harmon v. *Ohio*, 58 L. R. A., 618; 66 Ohio St., 249.
Noel v. *The People*, 187 Ill., 587.
Gundling v. *Chicago*, 177 U. S., 183.
Minn v. *Fleischer*, 41 Minn., 69.
City of Monmouth v. *Popel*, 183 Ill., 634.
Cumming v. *Missouri*, 4 Wall., 377.
Ex parte Garland, 4 Walll, 333.

This being the character of such legislation, compare it with the act in question. What are the qualifications for the admission of tea furnished by the act which are to be determined by the Secretary of the Treasury on the recommendation of the tea board?

Is there any "quality" of tea which one can say is so universally recognized as an indispensible feature of tea, that the use of the word "quality" indicates the precise and definite thing intended to be established as a standard?

If not, when the Secretary is authorized to fix a standard of quality, is there any guide in the natural order of things or in the statute to control his action? Since it is manifest that there is not, the exercise of the power under the statute is arbitrary and not measured by any rule.

As well might the Legislature authorize a board to determine the quality of wines, of perfumes, of colors, of all and every attribute of an article of trade which depends upon taste and fancy, and on the basis of such determination restrict or prohibit trade.

Moreover the action of such boards as are referred to is open to review by the courts and if the requirements are unreasonable or the proceedings unjust or unfair, they may be corrected (*Dent* v. *West Virginia*, 129 U. S., 114, 125; *Rietz* v. *Michigan*, 188 N. Y., 505). But the proceedings of the Secretary in fixing the standings are not reviewable by *certiorari* (*People* v. *Gage*, MSS. see appendix), nor by bill in equity (*Sang Land* v. *Jackson*, *supra*; *Buttfield* v. *Bidwell*, *supra*), nor otherwise. If this act is constitutional and the Secretary should fix standards which should admit annually only 100,000 pounds of tea in the place of the 90,000,000 pounds of pure, wholesome and genuine tea now imported, his action could not be reached by judicial proceedings. This was one of the circumstances animadverted upon in *Wick Wo* v. *Hopkins* as showing that the powers conferred were arbitrary.

Moreover, as we have said, the requirements regulating the practice of a profession, trade or industry must be such as to be within the attainment of all; opportunity must be equal. If one devotes enough ability, time and industry the requirement must be within his reach. This is universally true, except where the pursuit is immoral or has an immoral or dangerous tendency. But no one by any skill in horticulture or in manipulation can produce teas which will meet the requirements which the Secretary of the Treasury may make as to the quality of tea. It is like measuring space by the distance between the clouds.

(5.) The statute in practical operation, as shown by the records in two of the cases before the Court,

demonstrates its arbitrary character. The evidence shows that the standard for Country Green teas for the year 1901, if it had been uniformly applied, as required by law, would have excluded 70 per cent. of the entire crop, the average quality of these teas being higher than that of other kinds of tea imported into this country (Record, Buttfield *v.* Stranahan, fols. 71, 36). It would have cut down the importation of Country Green teas from between 5,000,000 and 6,000,000 pounds to less than 2,000,000. If the same standard of fineness of quality had been extended through the entire importation of teas it would have excluded 75 to 80 per cent. of all teas that are usually imported into this country (same Record, fol. 71), reducing the importation from 90,000,000 bounds to 10,000,000 or 15,000,000.

The standard was placed at the fifth grade of Country Green teas (Buttfield *v.* Stranahan, Exhibit 8, p. 19), there being in all seventeen grades of quality. There is no reason why the Secretary should have placed the standard where he did rather than at any other grade. Indeed, there is nothing in the law which would give redress if the Secretary had made no standard at all. In the preceeding and following years (1900 and 1902) the standard for Country Green teas was very much lower (fols. 114, 115, Buttfield *v.* Bidwell). The standard established in 1901 for teas other than Country Greens was much lower in quality (Bidwell, fol. 119). The chairman of the Board of Tea Experts attempts to explain the high standard of Country Green teas (No. 7) for the year 1901 by saying that when the standard was selected there were no teas in the market appropriate for a standard that were inferior in cup quality to the teas which were selected as the standard, though such teas are produced (fol. 62, Record, Buttfield *v.* Stranahan). This is an admission that the standard was arbitrarily fixed upon a mere matter of convenience. The arbitrary character of the Secretary's action in fixing

the standard appears from the provision of Regulation XX. "As an illustration, a Teenkai may be equal to a Moyune, but a distinctly smoky or rank Fychow, or Wenchow of sour character, must not be considered as equal to the two first mentioned" (Buttfield *v.* Bidwell, Record, p. 26). That regulation, on its face, contemplated that there were Wenchow and Fychow teas which might come in, but by the standard established in 1901, all Fychow and Wenchow teas were excluded, whatever their quality, purity or fitness for consumption (fol. 118), notwithstanding the uncontradicted fact that there are a great many such teas which are ordinary subjects of commerce and which are wholesome and suitable for consumption (fol. 118). More than that, the Court has before it the opinion in the *certiorari proceedings*, where an attempt was made to revise the action of the Secretary in fixing this standard, and although months had then elapsed and abundant opportunity had been afforded to obtain samples of Country Green teas which were appropriate as samples, no effort was made to do so. Why not? May it not be fairly inferred that the government was determined to demonstrate to this plaintiff and others in sympathy with him that it had the arbitrary power to fix the standard where it pleased, and that neither he nor any other citizen could question that power? This is the position it has uniformly taken. It is this assumption of absolute and arbitrary power by the Secretary of the Treasury to exclude, upon advice of a board of those interested in the tea trade, if he will, any and every grade and character of tea, which is challenged by the plaintiff in this case.

(4.) The powers conferred by this act are arbitrary because they authorize the Secretary to fix a physical standard which from its nature is variable, and which cannot be applied with reasonable certainty. This statute attempts to make a physical thing itself a rule of law. No similar enactment

can be found upon the statute books. This standard being a vegetable product, must necessarily vary from day to day. Being a standard of quality, determined by the sense of taste and smell, it is impossible to test the truthfulness or accuracy of its application.

In the report of the Senate Committee it is said that "it is a well known fact that experts vary in their impressions of value as proven continually by valuations of public auctions in which the teas are never valued the same by different brokers, but frequently at twenty or thirty per cent. variation." It is a matter of ordinary experience that our faculties of taste and smell vary greatly on different occasions.

Moreover, the report of these two faculties is purely subjective. It is impossible to test the accuracy of the senses as reported by the examiner or the truthfulness of his report by any rule.

The instances in which legislation prohibiting trade in articles of food, unless conforming to a standard prescribed by the law, as in the milk cases requiring a certain proportion of oleaginous matter, stand on a different footing. It is possible to apply a test outside of the mental operation of the examiner in all such cases, but not in this case.

There is no similarity here to standards of weight or measures or to coins, because each of these have mathematical properties which are capable of precise application.

5. *Apart from the arbitrary power lodged with the Secretary, the act is unconstitutional because it prevents the plaintiff and others from dealing in a wholesome and ordinary article of commerce, and destroys a trade in which he and others had been engaged.*

(1.) While laws prohibitory of the manufacturing and sale of liquor as an article dangerous to public safety and public morals have been sustained as

within the police power of a State, in *Austin* v. *Tennessee* (179 U. S., 343, 347), Mr. Justice Brown said, "How far such laws could be made applicable to articles admitted to be innocuous has never been decided by this Court." It was distinctly left open in the lottery case, as far as the question was there presented (Lottery case, 188 U. S., 321, 362). But there is abundant authority upon this subject in the opinions of State Courts of last resort. The leading authority is *The Matter of Jacobs*, 98 N. Y., 98. In that case the manufacture of cigars or the preparation of tobacco in any form on any floor or in any part of a floor in any tenement house was prohibited, if such portion of the house was occupied as a residence, and the carrying on of this industry under such circumstances was declared to be a misdemeanor. The trade thus prohibited was deemed to be perfectly lawful, and the prohibition was regarded as an arbitrary and unjust interference with the right to labor, which could not be justified by the police power because it could not subserve the just ends of public welfare to prohibit an honest industry, pursued by a man within his own habitation. The stirring language of Judge Earl in that case, which has become familiar from repeated quotation, is a vigorous protest against legislation of which the statute here under review is a type.

A case perhaps even more directly in point is *The People* v. *Biesecker*, 169 N. Y., 53. There the legislature enacted that "no person shall sell, offer or expose for sale any butter or other dairy products containing a preservative, but this shall not be construed to prohibit the use of salt in butter or cheese or spirituous liquor in club or other fancy cheese or sugar in condensed milk." A violation of the act was made a misdemeanor. Mr. Justice Cullen, writing the unanimous opinion of the Court, said:

> "The limits of the police power must necessarily depend in many instances on the common knowledge of the times. An enactment

> of a standard of purity of an article of food, failing to comply with which the sale of the article is illegal to be valid, must be within reasonable limits, and not of such a character as to practically prohibit the manufacture or sale of that which as a matter of common knowledge is good and wholesome."

The case of *People* v. *Hawkins*, 157 N. Y., 18, is equally instructive upon this point. There the legislature made it a penal offense to sell articles made in a prison or penitentiary of any state unless stamped "convict made." The defendant was charged with the crime of having sold within the State of New York a brush made by the labor of convicts in prison in Cleveland, Ohio, not having upon it the required words. The Court said:

> "The guaranty against depriving the citizen of his liberty comprehends much more than the exemption of his person from all unlawful restraint. It includes the right to engage in any lawful business, and to exercise his faculties in all lawful ways in any lawful trade, profession or vocation. All laws, therefore, which impair or trammel these rights, or impose arbitrary conditions upon his right to earn a living in the pursuit of a lawful business are infringements upon his fundamental rights of liberty, which are under constitutional protection."

In *People* v. *Marx*, 99 N. Y., 379, a statute prohibiting the "manufacture out of any oleaginous substances, or any compound of the same, other than that produced from unadulterated milk or of cream from the same" or the sale of the same as an article of food, and imposing penalties for violating the provision, was held unconstitutional. It was claimed that this legislation was intended for the protection of dairy products against the competition of cheaper articles of food not injurious or fraudulent. It was held that the right to conduct and follow a lawful industry could not be arbi-

trarily prohibited by the legislature for the reason that it competes with another. It is true that similar legislation was sustained in the State of Pennsylvania, and that judgment was affirmed by this Court in the case of *Powell* v. *Penn.*, 127 U. S., 678. The Court held that the presumption must be indulged that the law was in good faith enacted for the protection of the public health, and to prevent the adulteration of dairy products and fraud in the sale thereof, and that the offer to prove that the oleomargarine sold by the plaintiff was a wholesome and nutritious article did not meet the presumption. A different situation would have been presented if the offer had been to prove that oleomargarine was a wholesome and nutritious article.

It is to be observed that oleomargarine was at that time a novel article of food. The time had not come when the Court could say, as it did in *Schollenberger* v. *Penn.*, 171 U. S., 1, where the question before the Court was whether oleomargarine was an article of interstate commerce, that "if properly and honestly manufactured it is conceded to be a healthy and nutritious article of food," and where the same act was held to be unconstitutional, so far as it prohibited the introduction of oleomargarine from another State and its sale in original packages.

An illustration even more forcible is found in *Collins* v. *New Hampshire*, 171 U. S., 30, where the statute made it an offense to sell oleomargarine not colored pink. Although the statute did not in terms extend sales without the State, the act was held unconstitutional as being in contravention of the commerce clause.

Of a similar character, although arising under legislation of a different class, was the decision in the case of *Minnesota* v. *Barber* (136 U. S., 313), where this Court held that a law of the State of Minnesota prohibiting the sale of any fresh beef, &c., except such as had been taken from an animal

inspected in the State within 24 hours before the slaughter, was in violation of the Constitution of the United States giving Congress power to regulate commerce, as well as the provision declaring the citizens of each State entitled to all the privileges and immunities of citizens of the several States. The Court said:

> "But a law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State of sound meats, the product of animals slaughtered in other States. It is one thing for a State to exclude from its limits cattle, sheep or swine, actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals, or of such meats within its limits. It is quite a different thing for a State to declare, as does Minnesota, by the necessary operation of its statute, that fresh beef, veal, mutton, lamb or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State."

See also

Brimmer *v.* Rebman, 138 U. S., 78.
R. R. Co. *v.* Husen, 95 U. S., 465.

In this connection reference may properly be made to the case of *Allgeyer* v. *Louisiana* (165 U. S., 578), where the plaintiff had been fined for a violation of the Louisiana statute preventing persons from dealing with marine insurance companies that had not complied with such statute. The statute subjected any person who should fill up a certificate of

insurance under an open marine policy or by any act in that State to effect insurance on property in the State in any marine insurance company which did not in all respects comply with the laws of that State to a fine of $100 for each offense. The Court held that the plaintiff could not be held liable under this statute for filling up and mailing from New Orleans to the Atlantic Mutual Insurance Company of New York an order for a policy of insurance. The Court held that the act done within the limits of the State was a proper one, which the State Legislature had no right to prevent, and that the statute was in that regard unconstitutional. The Court said:

> "The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

That the Legislature may not, under guise of police regulation, prohibit trade in wholesome articles is supported by other authorities.

Dorsey v. *Texas*, 40 L. R. A., 201.
Helena v. *Dwyer*, 39 L. R. A., 266.
Baltimore v. *Radecke*, 49 Md., 417.

It scarcely need be remarked that cases like *Plumely* v. *Mass.*, 155 U. S., 461, 476, and *People* v. *Arnsberg*, 105 N. Y., 123, are not in conflict with this position. In those cases the State legislation was

held to be a valid exercise of the police power for the purpose of preventing misrepresentation and fraud as to identity, and even though the article was wholesome, it was held that such misrepresentation and fraud might be prohibited.

Nor are the principles announced in *Booth* v. *Illinois*, 184 U. S., 425, and *Otis* v. *Parker*, 187 U. S., 606, in conflict with the plaintiff's contention. In the first of these cases the defendant was indicted for a violation of a statute imposing a penalty upon a person contracting to give an option for the sale of stock. The second case was an action to recover margins deposited on the purchase of stock, based upon the provision of the constitution of the State of California that all contracts for the sale of shares of stock on margin should be void. The doctrine laid down in the Booth case, and extended in its application to the Otis case was stated as follows: That the Courts cannot interfere with statutes of this character on the ground of their unconstitutionality "unless looking through mere forms and at the substance of the matter they can see that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear unmistakable infringement of rights secured by the fundamental law." If the object of the statute in question was to prevent the importation of unwholesome and deleterious tea and to protect the community against fraud and imposition, it is self evident that the importation of wholesome teas having no element of deception cannot have any real or substantial relation to that subject. But if it be said that wholesome teas may be excluded because they may possibly be unfit for consumption because of their quality, then we say that if this is made to depend upon suspicion, and not upon fact, it has the inherent vice which attaches to the deprivation of liberty or property upon suspicion and not upon fact.

In Schollenberger *vs.* Pennsylvania, 171 U. S., 1,

14, it was said: "We do not think the fact that the article is subject to be adulterated by dishonest persons in the course of its manufacture with other substances, which, it is claimed, may in some instances become deleterious to health, creates the right in any State, through its legislature, to forbid the introduction of the unadulterated article into the State."

But if it be further claimed that the object of the statute was to exclude inferior teas, although pure, genuine and wholesome, then we say that this does not come within the police power nor within any power of government consistent with individual liberty, because the sale or consumption of inferior teas which are pure and fit for consumption has no real or substantial relation to the public health, morals or safety, and the exclusion under this statute is not supported on any other ground.

(3.) If the act be construed according to its language as interpreted by the Courts below and the claim of the Government, the Secretary and the board have the unquestioned right to fix a standard which will exclude wholesome tea. The right to import any tea is made to depend entirely upon the will of the board and the Secretary. Wholesome teas may, therefore, be excluded. Indeed they cannot be imported unless the Secretary permits it, and there is no provision in the law which makes it obligatory upon him to permit it.

"The constitutional validity of a law is to be decided not by what has been done under it, but what may by its authority be done."

Stuart v. *Palmer*, 74 N. Y., 183, 188.

Cited with approval in Montana Co. *v.* St. Louis M. & M. Co., 152 U. S., 160, 170.

The validity of the statute "must be determined by the nature, character and scope of the powers attempted to be conferred, although they may not have been actually exercised" (People *v.* Mosher,

163 N. Y., 39, 42; Colon *v.* Lisk, 153 N. Y., 194; Gilman *v.* Tucker, 128 N. Y., 190).

The practical administration of the law, as shown in the cases at bar, has, therefore, no direct bearing upon the question of constitutionality. It assists only in showing how the statute is construed by the Government. In each of the cases in which evidence was interposed, it was shown that the teas sought to be imported were pure and wholesome.

In the Bidwell case the testimony was that all the teas were pure, genuine tea leaves, wholesome and fit for consumption (fols. 51, 52, 91, 92, 127, 128). No evidence was introduced by the Government, and the testimony of the plaintiffs' witnesses must, therefore, be taken as true.

If it were otherwise possible to do so, the Court is not at liberty, in view of this evidence, to presume that the teas were rejected because they were unwholesome. The Examiner by regulation is required to state the ground of rejection (Regulation 29). The teas were rejected as "inferior to the standard in quality" (fols. 13, 14), and this finding was affirmed by the Board of General Appraisers (fol. 17). But the quality of the tea does not refer to its wholesomeness. It does not represent hygienic qualities (*ante*, p. 24). Therefore, the finding of the examiner and the tea board was not inconsistent but in harmony with the evidence in the case.

In the Stranahan case evidence was introduced by the defendant. Mr. Hewlett, the chairman of the board of tea experts, testified that the excluded teas were in his opinion pure (fol. 56). He said, "In my opinion there were grades inferior to No. 7 (the standard) which were perfectly pure, genuine tea leaves, free from adulteration and differed from the standard only in flavor. That was true in regard to these teas in question—the eight packages—that they differed from the standard only in flavor, that is, the flavor in my opinion was decidedly inferior to the flavor of the standard. That is the only dis-

tinction that I found between these teas and the standard" (fol. 61). This testimony is in harmony with the testimony of the plaintiff's witnesses (fols. 36, 43, 54). The finding of the tea examiner was that the teas were inferior to the standard in "quality" (fol. 6), and this finding was affirmed by the tea board of General Appraisers (fol. 6). It is not possible for the Court to presume, in the face of this evidence and finding, that the teas were impure and unwholesome.

This act, therefore, not only permits the exclusion of wholesome teas, but in actual operation excludes such teas.

6. *The Act is unconstitutional because it discriminates unequally in the importation of different kinds of tea and, therefore, denies the plaintiff the equal administration of the laws.*

(1.) The Fifth Amendment guarantees the equal protection of the law. Although it does not do so in terms, yet the equal protection of the law is a part of that liberty which it is the purpose of that Amendment to secure.

(2.) The law is unequal because it permits a different standard of excellence for the admission of different kinds of tea, and because it denies to the citizen the privilege of purchasing a lower grade of a cheap and wholesome article, and compels the purchase of a more costly and superior grade. A uniform standard of quality or excellence of all kinds of tea is manifestly impossible. The excellence of teas varies indefinitely. Teas come principally from China, Ceylon, India and Japan. Their quality depends upon climate, soil, methods of cultivation and preparation. A small chop of teas grown upon land particularly well adapted for the cultivation of the plant and carefully nurtured may be much choicer than a chop coming even from the same locality, but not produced under the same

favorable circumstances. Any attempt to admit or exclude teas upon the basis of quality must necessarily result in partiality and injustice. The importer who has built up a trade in a certain description of tea or has established constituencies in certain localities in China, Japan or Ceylon at large expense may find his industry ruined by having two-thirds of his crop refused admission because the board of experts or the Secretary of the Treasury in some particular year may think his description of tea not sufficiently good, or for some reason wish to curtail or prevent entirely the sale of that kind of tea. The next year another importer finds his teas excluded for a similar reason. There can be no uniformity in the application of such a rule. It cannot bear upon all alike. It must be oppressive to some and generous to others. It permits the board, should its members be unscrupulous, to manipulate supplies and prices for their own interests or gain.

Moreover there is in the statute no restraint upon a change of standards at any time. Although the board is appointed annually and the Secretary has heretofore established annual standards, yet this is merely optional. The statute neither requires annual standards nor limits the power to annual action. The board and the Secretary may to-morrow establish new standards and put them in operation and so exclude a large proportion of the teas now in transit which would be admissible under present standards. The constitutionality of a statute, as has been already stated, is to be determined not by what has been done but by what may rightfully be done under it.

Montana Coal Co. v. *St. Louis Mine Co., supra, and cases cited, ante,* p. 61.

The law is equally oppressive to the consumer. Everybody knows that different races and classes have varying tastes in foods and drinks which they indulge without apparent injury, those that

are commonest and coarsest often furnishing the most nutriment and securing the most robust health. If the purpose of this law is to secure the consumption of a better or superior class of teas, it is unconstitutional for the same reason that any sumptuary law would be unconstitutional. It has been supposed that under the rule of civil liberty a man had the right to eat and drink such food as he might chose provided it was not injurious to his health or morals, or likely to endanger the welfare of his fellow-men. "In former times sumptuary laws were sometimes passed and they were even deemed essential in republics to restrain the luxuries so fatal to that species of government. But the ideas which suggested such laws are now exploded entirely, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law" (Cooley Cons. Lim., 7th Ed., p. 549). A law to cultivate a fine taste in teas is as obnoxious as a law to repress an over-fastidious taste in teas. Neither one or the other come within the province of government. One of the Judges of this court expressed the feeling which instinctively opposes such legislation when he said, "The paternal theory of government is to me odious" (Brewer, *J.*, in *People* v. *Budd*, 143 U. S., 517).

Since it is apparent that the real purpose of this law as administered is not merely to prevent fraud and deception or the sale of an injurious article, we must look for some other purpose. This is a measure admirably adapted to regulate supply and demand so as to enhance values and prevent the market from becoming overstocked in any given season and to prevent the decline in prices which would result therefrom. It is a great boon to the wholesale grocer, jobber and middleman, because it prevents the sale of surplus stocks at auction and tends to keep up a uniform scale of prices while all risk of loss is im-

posed upon the few importing houses whose teas may be shut out. It is a weapon in the hands of members of the Board of Experts which can be used to curtail or destroy entirely the business of their competitors importing descriptions of tea other than those in which they are interested. No scheme better adapted for exploiting capital employed in trade for the benefit of those who do no not furnish the capital has ever been devised. It comes within the condemnation of such cases as *People* v. *Marx* (99 N. Y., 380); *Connolly* v. *Union Sewer Pipe Co.* (184 U. S., 540, 558).

7. This law ought not to be sustained because the establishment of this precedent will open the door to methods of government which experience has shown to be fatal to liberty.

This Act presents an extreme instance of government by commission. It places one industry—a small one, to be sure—completely in the control of the Secretary of the Treasury and a board nominated by him. If this legislation is sanctioned every article of commerce imported from abroad or transhipped within the states may be regulated by a like commission placed in the hands of some official and a board designated by him.

Since State lines for the purpose of commerce are practically obliterated, this would mean the placing of all trade and commerce in the hands of such commissions. A bureaucracy over trade is thus established with all the inevitable abuses which attend the system.

This law defended as possibly injurious to a few while beneficent to the many, if sustained, will find successors. "One precedent creates another. They soon accumulate and constitute law. What yesterday was fact to-day is doctrine. Examples are supposed to justify the most dangerous measures, and when they do not suit exactly the defect is supplied by analogy." It is well to heed the language of Mr.

Justice Bradley in *Boyd* v. U. S. (116 U. S., 635). "It may be that it is the obnoxious thing in its mildest and least reprehensive form; but illegitimate and unconstitutional practices get their first footing in that way; namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. * * * It is the duty of Courts to be watchful for the constitutional rights of citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

II.

The act is unconstitutional because it attempts to delegate to the Secretary of the Treasury and a board named by him legislative powers which can only be exercised by Congress.

1. The Constitution confers upon Congress the power to regulate commerce with foreign nations, among the several States and with the Indian tribes (Art. 1, Section 8).

It is unnecessary to argue that an attempt to exercise this power by any person or body other than Congress would be an usurpation and a bold defiance of the Constitution, which could not be justified by the pretense that Congress had abrogated or surrendered its power.

If an argument could be framed that a State legislature by reason of supposed omnipotence might confer legislative power upon the Executive, no such argument can be supported in respect to a congressional power which is express and defined.

2. If Congress has not by this enactment established a rule of law as to the admission and exclusion of teas, but has authorized the Secretary of the Treasury to establish such a rule of law, then it is a matter of no importance whether we call this a delegation of legislative power or whether we say that it confers arbitrary powers upon the Secretary of the Treasury. In either event it is equally destructive of liberty and obnoxious to the letter and spirit of the Constitution.

The Constitution does not in terms prohibit the delegation of legislative power; few of the State constitutions do, and yet legislative power cannot be constitutionally delegated because to do so is to set up an arbitrary government vested in an individual or a body outside of the legislative authority provided by the Constitution. This is destructive of republican institutions and constitutional freedom, and, therefore, repugnant to the Constitution.

8. Apart from the many individual expressions found in the opinions of the Judges of this Court, it has been expressly decided in the case of *Stoutenbergh* v. *Hennick*, 129 U. S., 148, that the power to regulate commerce cannot be delegated. In that case it appeared that the legislative assembly in the District of Columbia, acting under powers supposed to have been granted by Congress, undertook to prohibit any person from engaging in business in the District without having first procured a license. A resident of the State of Maryland having violated this provision was arrested, and the question arose whether the action of the legislative assembly was authorized. The Court held that inasmuch as the right to impose such a requirement as against the resident of another State had been adjudged to be a regulation of commerce within the exclusive control of Congress (*Robbins* v. *Shelby County*, 120 U. S., 489; *Asher* v. *Texas*, 128 U. S., 129), Con-

gress could not delegate its power, and, therefore, the action of the Municipal Assembly could not be supported by any grant of authority supposed to be derived from Congress.

The instances in which Federal and State courts have declared legislation unconstitutional as being an attempted delegation of legislative power are numerous. We cite a few of them:

In *Dent* v. *U. S.*, 71 Pac., 920, it appeared that Congress had directed the Secretary of the Treasury to make provisions for the protection of the public forest and forest reservations, against destruction by fire and depredations, and to make such rules and regulations as would insure the objects of such reservations, and to regulate their occupancy and use, and any violation of the provisions of the act or of such rules and regulations should be punished as provided. Under the power so conferred the Secretary promulgated certain regulations, among which was one prohibiting the pasturing of sheep on the public lands in a forest reservation. The defendant was prosecuted for an infringement of this regulation. The Supreme Court of Arizona held that the act was unconstitutional as being an attempted delegation of legislative power, concurring with the opinion of the District Judge of Southern California, in *U. S.* v. *Blasingame*, 116 Fed., 654, and differing with the District Judge of Idaho, in *U. S.* v. *Dastervignes*, 118 Fed., 199.

In *U. S.* v. *Keokuk Co.*, 45 Fed. Rep., 178, and *U. S.* v. *Rider*, 50 Fed. Rep., 406, it was held that Congress could not confer upon the Secretary of War the power to determine when and where a bridge should be built over the navigable rivers of the country, because that is a regulation of commerce. On appeal to this Court, in the latter case, the question of delegation of legislative power was left open, the case going off on a different point (*Rider* v. *U. S.*, 178 U. S., 251; see also *U. S.* v. *City of Moline*, 82 Fed. R., 592).

In *Harmon* v. *Ohio*, 66 Ohio St., 249; 58 L. R. A., 618, an act which provided for the appointment of a chief engineer by the Governor, with the power to appoint six district engineers, to whom persons desiring to act as steam engineers might make application for a license and "if, upon examination, the applicant is found trustworthy and competent, the license should be granted him," was held unconstitutional as furnishing no standard of qualification, but as leaving all to the opinion, finding and caprice of the examiner, and hence invalid as a delegation of legislative power.

In *Schazlin* v. *Cabaniss*, 67 Pac. Rep., 755, an act authorizing the Commissioner of Labor to direct what, if any contrivance, shall be set up in a factory to prevent the inhalation of filaments or injurious gases was declared unconstitutional.

In *Dowling* v. *Insurance Co.*, 31 L. R. A., 112, and *O'Neil* v. *Insurance Co.*, 166 Pa., 71, the authority conferred by the Legislature upon the Commissioner of Insurance to fix a standard form of insurance policy and forbidding the use of any other was held to be a delegation of legislative power.

In *Adams* v. *Brudge*, 95 Wis., 390, a statute was held unconstitutional which authorized a school board to make such a rule as would prevent the attendance of children at school who had not been vaccinated.

In *Barto* v. *Himrod*, 8 N. Y., 483, where the fact of an act passed by the Legislature becoming a law was made to depend upon the result of a popular vote, the Act was held to be unconstitutional and void as being an attempted delegation of legislative power.

These cases, as well as the expressions made use of by the Supreme Court in *Field* v. *Clark* (143 U. S., 649) an *In re Kollock* (165 U. S., 526); *U. S* v. *Eaton* (144 U. S., 677); *Kilburn* v. *Thompson* (103 U. S., 168, 191), sufficiently demonstrate that where it appears that legislative power has been delegated, such action will be held unconstitutional.

The practical difficulty is to determine when there has been a delegation of legislative power.

4. The test of delegation of legislative power has been carefully stated by this Court. Speaking of the line of distinction between legislative power and executive action, Mr. Justice Harlan, quoting the opinion in *R. R. Co.* v. *Commissioners*, 1 Ohio State, said: "The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made" (*Field*, 143 U. S., 649, 691).

So in *Miller* v. *Mayor*, 109 U. S., 385, the Court said: "The efficacy of the act as to the declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingencies upon which the act shall take effect may be left to such agencies as it may designate."

These declarations of the rule have been uniformly accepted.

5. While "the legislature may delegate powers not legislative which it may rightfully exercise itself" (*Wayman* v. *Southard*, 10 Wheat., 43) it cannot under the guise of conferring discretion confer an authority to make the law.

By this statute all teas are excluded from import. No one has a right to import tea until the Secretary makes a standard. He, therefore, makes the right. But if the Secretary is bound to establish standards according to some rule, and he is merely performing an executive function, then if he does not fix the standard according to the rule his act is invalid and the citizen's legal rights have been invaded. But has the citizen any remedy—not by *certiorari* (*U. S. ex rel. Hamilton* v. *Gage*, appendix); not by mandamus, because the power is discretionary and

it cannot be controlled by mandamus, although abused (*U. S.* v. *Lynch*, 137 U. S., 280); plainly not by suit against the Secretary for damages. Can he compel the Collector to admit the teas, or answer in damages—plainly not if the contention of the Government is right that all teas are excluded which are not within the standard, even though the Secretary may have erred in establishing the standard, for then the teas are within the general exclusion. It follows that since there is no remedy the Secretary is bound by no rule.

The powers conferred are vague and undefined affording no protection to the citizen and fastening no liability upon the Secretary.

6. The counsel for the Government calls attention to a number of cases in which officers have been clothed with certain discretionary powers, as though they were analogous to and sustained the present statute.

(1.) Thus reference is made to the decision in *The Brig Aurora*, 7 Cranch, 382, where the President was authorized to declare the termination of the Non-Intercourse Act upon the happening of certain events. This case and others of the same character are sustained upon the theory that when the statute came from the hands of the Legislature it was law which was made to take effect or terminate upon the happening of a certain event, to be certified by the President or other officer. Plainly, both the law itself and the direction as to when it shall take effect and terminate are both prescribed by the legislative will (*Field* v. *Clark*, 143 U. S., 649; *Barto* v. *Himrod*, 8 N. Y., 483).

(2.) Reference also is made to discretionary powers conferred upon boards authorized to establish rules and to give certificates entitling persons to practice certain professions and pursuits. We have already considered these cases to some extent. A distinguishing feature is that the discretion is

never arbitrary or final, but is always subject to review; it is directed to the ascertainment of certain facts, upon the existence of which the right to practice the calling or pursuit depends, and not upon the will of the board. These facts are definite and certain, and are recognized as the requirements of the Legislature, and not of the board. Other instances are referred to where persons have been prohibited from using public streets and places without first obtaining license from the mayor and other officials, as in *Wilson* v. *Eureka City*, 173 U. S., 32, and the cases there cited. But these cases stand upon the municipal ownership of public places and the control of public streets for public purposes. In general they relate to ordinances by which persons desirous of making special use of public streets and places are required to obtain a permit from an official before doing so. Such ordinances would stand on a different footing if they required every person to obtain a permit from an official before he could use the streets or public places for ordinary purposes of travel or traffic.

Cicero Lumber Co. v. *Cicero*, 176 Ill., 9; 42 L. R. A., 696.

(3.) Executive officers are frequently empowered to make regulations to carry into effect duties imposed upon them. These are rules and methods of administration. The power to make such regulations would have some application in this case if Congress had prohibited the importation of impure and unwholesome tea, and if it had then required the secretary to fix a standard of purity and wholesomeness as a rule of administration. In that event, if he had established a standard which excluded pure and wholesome teas he would have exceeded his authority.

Morrell v. *Jones*, 106 U. S., 466;
U. S. v. *Eaton*, 144 U. S., 677;
U. S. v. *Three Barrels of Whiskey*, 77 Fed. Rep., 963.

It has been repeatedly held that under the power to make regulations the Executive can neither extend nor contract the law.

Balfour v. *Sullivan*, 19 Fed. Rep., 578;
Pascal v. *Sullivan*, 21 Fed. Rep., 496;
Siegfried v. *Phelps*, 40 Fed. Rep., 660,

and cases above cited.

(4.) The case of *Dunlap* v. *U. S.*, 173 U. S., 65, is not analogous to the case at bar. There a rebate on tax on alcohol used in the arts was granted when the alcohol was used under regulations to be prescribed by the Secretary of the Treasury. The Court held that the taxpayer had no present right to the rebate until the regulation was made. It was a privilege granted on certain conditions, which were left to some extent to the discretion of the Secretary. There was no interference either with a natural or vested right.

(5.) The case of the *Consolidated Coal Co.* v. *Illinois*, 185 U. S., 203, is distinguishable in several features from the case at bar. That was an action to recover fees for the inspection of coal mines under a statute which authorized an inspector to fix a fee of not less than six dollars and not more than ten dollars for each inspection, and made it his duty to inspect as often as he might deem it necessary and proper, but at least four times a year. This Court held that the inspection of mines for the protection of the health and safety of operatives was a proper subject of police legislation, and that the discretion lodged with the inspector was not arbitrary. It is obvious that there was a limit to the number of inspections as well as to the fees that could be charged. If the statute had authorized the inspector not only to make as many inspections as he thought it necessary, but to charge such a fee as he thought proper it is not probable that the same conclusion could have been reached. In that event there would

have been nothing to prevent the confiscation of the miner's entire property for inspection fees.

(6.) Reference is made to a number of statutes, and more might be cited, where powers apparently legislative have been conferred upon boards and officers, which have never been brought under review by the courts. It may be that the administration of these laws, although unconstitutional, has been such that no one has sustained a sufficient injury to provoke him to the annoyance and expense of testing their constitutionality, and in many instances arbitrary powers are beneficiently administered. No argument in support of the tea act can be properly drawn from these untested statutes.

III.

The act is unconstitutional, because it does not provide that notice and an opportunity to be heard be afforded the importer before the rejection of his tea by the tea examiner, or the Tea Board of General Appraisers.

The proceedings upon the examination of teas by the tea examiner are set out in Sections 4 and 5 of the act. The importer is required to submit samples of each line of tea to the examiner, with a sworn statement that the samples represent the true quality of each and every part of the invoice.

The tests to be applied are stated in Section 7. It is provided that "the purity, quality and fitness for consumption of the same (the teas) shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis."

There is no requirement of notice to the importer of the time or place when or where the examination will be made, or of the tests applied by the inspector. The importer has no opportunity to be present or to know whether the examination is made as prescribed in the statute, hence the proceedings are not conclusive.

After his teas are rejected, the importer may enter a protest and "the matter in dispute" is then referred to a board of three general appraisers, and it is provided that if such board shall "after due examination" find the teas equal to the standard they shall be admitted, otherwise they are to be rejected. The same method of examination as that prescribed to be made by the tea examiner is to be made by the Board of General Appraisers (Section 7), except that the statute provides "that the Board of United States General Appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars" (Section 8).

There is no provision for notice to the importer of the proceedings before the Board, and no opportunity is afforded him to be present at the examination of the teas, or to witness the testing, or to know what persons, if any, are called in as expert advisors, or how they conduct their examination. In point of fact the Board of Appraisers refuse to permit the importer to be present when the teas are being examined, or to furnish him with knowledge as to what persons are called as experts.

1. However absolute may be the power of the Secretary to fix the standard, it cannot be doubted that after the standard has been fixed, and so long as it remains in force, the importer has the legal right to import teas which are equal to the standard, of which he cannot be deprived by the

examiner or by the Tea Board of General Appraisers without due process of law, the essential element of which is notice and an opportunity to appear.

We are not now concerned as to what the character of the notice shall be, or what shall be the extent of the hearing, but we are insisting that the importer is entitled to some notice and to be present at the examination and testing of the teas.

(1.) The act itself must provide for the notice, if not specifically it should fix the time and place for the hearing.

Kurtz v. *Sumption*, 2 L. R. A., 655, 144 N. Y., and Notes.
The Railroad Tax Cases, 13 Fed. Rep., 722, 752, 753.
Kurtz v. *Sumption, Treasurer*, 117 Ind., 1.
Reetz v. *Michigan*, 188 U. S., 505, 509.
Stuart v. *Palmer*, 74 N. Y., 186.

Voluntary notice will not suffice, because what is conferred as a favor to-day may be withheld to-morrow.

(2.) In *Turpin* v. *Lemon*, 187 U. S., 58, Mr. Justice Brown said, in delivering the opinion of the Court: "Due process of law was well defined by Mr. Justice Field in *Hagar* v. *Reclamation District*, 111 U. S., 701, in the following words: 'It is sufficient to observe here, that by "due process" is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in de-

privation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.'"

In *Davidson* v. *New Orleans*, 96 U. S., 97, 107, Mr. Justice Bradley, in his concurring opinion, said: "In judging what is due process of law, respect must be had to the cause and object of the taking, whether the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

See also *Lent* v. *Tillson*, 140 U. S., 316, 327.

In *Simon* v. *Craft*, 182 U. S., 427, 436, Mr. Justice White, in delivering the opinion of the Court, said: "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied, we are governed *by the substance* of things and not by mere form."

In the case of *Hagar* v. *Reclamation District Co.*, 108, 111 U. S., 701, and *Palmer* v. *McMahon*, 133 U. S., 66, the Court held: That there is a distinction between a tax imposed by direct legislative power, which calls for no inquiry into the weight of evidence, nor for anything in the nature of judicial examination before collection, and a tax imposed upon property according to its value, to be ascertained by assessors upon evidence. In the former case no notice to the owner is required; in the latter, the officers, in estimating the value act judicially, and notice and an opportunity to be heard are essential.

In Palmer *v.* McMahon, 133 U. S., 66, Mr. Chief Justice Fuller, in delivering the opinion of the Court, said: "The imposition of taxes is in its nature administrative and not judicial, but assessors

exercise *quasi* judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value."

The Examiners and the Board of General Appraisers exercise the same *quasi* judicial, or judicial powers, in determining the purity, quality and fitness for consumption of the teas, that the administrative officers in *Hagar* v. *Reclamation District* and *Palmer* v. *McMahon*, exercised in arriving at the value of the properties taxed there.

It is submitted that before appellant could be deprived of his property he should have had the benefit of such proceedings as this Court decided were "due process of law," in *Parsavant* v. *U. S.*, 148 U. S. 214, where Mr. Justice Jackson said, at page 222: "They had full notice of the proceedings before the Board of General Appraisers upon their appeal to said board, and ample opportunity to be heard on the question of the market value of the imported goods. It cannot, therefore, be properly said that they have been subjected to penalties, without notice or an opportunity to be heard, or been deprived of their property without 'due process of law.'"

This is not a proceeding for the collection of public revenue, in which cases summary remedies may be used which could not be applied in cases of a judicial character.

King *v.* Mullins, 171 U. S., 429;
Bells Gap R. *v.* Penn, 134 U. S., 232, 239.

2. The words, "due examination," in Section 6, do not import that notice or an opportunity for a hearing must be given. Such a construction would be forced and unnatural. The word "due" plainly relates to the method of conducting the examination as prescribed in the following section. The contention of the Government upon the argument before this Court in *Cruikshank* v. *Bidwell* was that the nature of the examination was such that no notice

was requisite; that the examination is a physical test to be made by the senses of the Examiner or the Board of General Appraisers, with the advice of the experts they may choose to call in, and that, therefore, the presence of the importer is of no practical importance to him. But the answer to this is that the importer is entitled to know that the proceeding is conducted in good faith and in the manner prescribed in the statute; that it is honestly conducted by disinterested experts, if experts are called. He is not to be deprived of his property by star chamber proceedings, from which he is rigidly excluded, where partial, interested and dishonest experts may be called without his knowledge to influence the judgment of the appraisers. It is not to be forgotten that the finding of the Board of General Appraisers is final; that no appeal to any court is provided; that a writ of *certiorari* does not run out of the United States courts to review the proceedings (McIntyre *v.* Wood, 7 Cranch, 504), and that State courts are without jurisdiction to issue such a writ directed to a Federal officer or board (McClung *v.* Silliman, 6 Wheat., 598).

The substance of the importer's right is that the tests prescribed by the act shall be applied to his teas, and that the persons from whom the board obtains advice shall be "persons skilled in the examination of teas" (Sec. 8). It is essential to the maintenance of these rights that the importer should at least be permitted to be present to know that the prescribed tests are applied and that the experts are in fact skilled in the examination of teas; and that he be afforded an opportunity to show, if the fact be so, that they are interested, unskilled or dishonest. That he may be present and have this knowledge it is indispensible that he have notice of the time and place of the examination. This much assuredly is essential to "due process."

IV.

The act is unconstitutional because it authorizes the confiscation of the importer's property without due process of law, as was the fact in the Stranahan case.

In the Stranahan case the teas were forcibly taken from their owner and were destroyed without any judicial finding. The statute provides for such destruction by the collector if the teas are not exported from the United States within six months after the final re-examination by the Board of General Appraisers (Section 6). It is sought to sustain this feature of the act under the authority of *Lawton* v. *Steele*, 152 U. S., 132. In that case it was held that fishing nets, which had been used in violation of law, might be seized and destroyed without judicial decree. The statute declared such nets to be treated as a public nuisance. The value of the nets in question in that case was $15. That decision appears to have proceeded upon two grounds: First, that the amount involved was too trifling to require a judicial proceeding for a forfeiture, and, second, that the aggrieved party had a remedy by replevin or trespass.

In the Stranahan case the value of the property is one hundred and twelve dollars, but all rejected teas, whatever their value, are to be destroyed under this statute, unless exported within six months. During the last year not less than 24,968 packages of tea were rejected as appears from official report. Nor is it believed that a statute providing for the summary seizure and destruction of property by an officer of the Government without process can be justified as constitutional otherwise than as the abatement of nuisance upon the ground that the citizen has a remedy of replevin or trespass.

The proceeding can be sustained only upon one of

two theories, either that the teas are a nuisance which the Government may abate by summary destruction, or that the teas are forfeited as a penalty for a violation of law.

But these teas are not a nuisance in the ordinary or legal signification of that term, unless any property, harmless and innocuous in its character, may become a nuisance by mere legislative declaration. This Court has held that such a doctrine is not to be tolerated.

Yates v. *Milwaukee*, 10 Wall., 497.

It would indeed be anomalous that teas which this year and last year and every year except the year 1901 were regarded by the public authorities as proper subject of food should by the edict of the Secretary become in that year a nuisance of such a highly dangerous character as to call for the extreme remedy of summary destruction without judicial process.

It is equally apparent that the confiscation cannot be sustained as a penalty. A penalty is a punishment for the violation of law. Assuming that the act of the importer in bringing teas into the port of New York and submitting them to the public authorities for inspection constitutes a violation of law if they are found to be unequal to the standards, it is certainly not too much to claim that before the owner shall be absolutely divested of his property as a punishment for such temerity he shall have an opportunity to be heard and to show that he has not violated the law.

If it be said that the penalty is not for trying to bring the teas in, but for failure to remove them after they had been rejected, then it is even more apparent that the penalty is inflicted without pleading, trial or judgment upon the conclusive and arbitrary finding of the collector of the port. The fact upon which the violation of law, upon this supposition, turns is the neglect to remove within six months after rejection. Whether that is a viola-

tion of law depends, therefore, upon two possible issues; first, whether the teas were lawfully rejected and second whether the time for their removal has expired. The importer might show if the opportunity were afforded him, that the law did not justify the rejection either because it was invalid or because it had not been properly enforced, or because the standards had not been legally fixed. None of these questions were concluded by the finding of the Board of General Appraisers. Without further extending this argument, already perhaps too lengthy, we refer in support of our contention to the following authorities:

Colon v. *Lisk*, 153 N. Y., 133.
Peck v. *Anderson*, 57 Cal., 251.
Dunn v. *Burleigh*, 62 Me., 24.
King v. *Hayes*, 80 Me., 206.
Lowry v. *Rainwater*, 70 Me., 152.
State v. *Robbins*, 124 Ind., 308.
Ridgway v. *West*, 60 Ind., 371.

V.

In Buttfield vs. Bidwell (No. 296), the evidence establishes a case of personal liability against the defendant.

In this case the defendant introduced no evidence. Upon the evidence submitted by the plaintiff the defendant's counsel asked the Court to instruct the jury to render a verdict for the defendant, among other things, upon the ground that "assuming the act to be unconstitutional, or if it were assumed that the Secretary had acted improperly in the matter no cause of action in tort had been established against Mr. George R. Bidwell" (Buttfield *v.* Bidwell, Record, fol. 167).

Previously to that motion the Court had held that

the plaintiff's evidence presented merely a question of law upon the record as to the unconstitutionality of the Act (fol. 159), and remarked that the evidence adduced was sufficient to warrant a direction of a verdict in the plaintiff's favor (fol. 159), if the Act was unconstitutional. We may, therefore, assume that the verdict was directed solely upon this ground of unconstitutionality. But if we examine the merits we shall find that the position taken by counsel cannot be sustained.

The evidence shows that the teas were entered for import at the Custom House, as required by law, and were sent to the bonded warehouse under the form set out at page 21.

The regulations require that the entries of teas be made on the ordinary warehouse forms and that a bond shall be taken from the importer that such tea shall not be removed from the warehouse until released by the Collector (regulation 1), and that if, on examination, the tea is found, in the opinion of the Examiner to come within the prohibitions of the law and of the regulations the importer shall be immediately notified and the tea shall not be released by the Custom House authorities unless on a re-examination called for by the importer (regulation IV.). The permit which is granted when teas are released is set out in the record at folio 26. The notice and rejection by the tea examiner is in the form set out at folio 57, and after examination by the Board of Appraisers, if the teas are still rejected, the Collector notifies the importer in the form set out at folio 59. It is impossible for the importer to obtain possession of his teas or to take them out of the warehouse except upon a permit granted by the Collector. No importer can remove or withdraw for consumption teas which have been entered without first obtaining a report of the tea examiner or of the Board of General Appraisers that the teas are equal to the standard (fol. 28), nor can he pay the duties until such a report is presented

(fol. 28). The payment of duties under such circumstances would not be accepted (fol 21). This is the regular course of business at the Custom House (fol. 20).

The act provides (Section 4) that in making entry at the Custom House of all teas the importer shall give a bond to the Collector that they shall not be removed from the warehouse "until released by the Collector" after examination. If the tea passes the examination, provided no re-examination is demanded by the Collector, a permit shall at once be granted to the importer declaring the tea free from the control of the Customs authorities, but if it is rejected the importer is to be notified, "and the tea shall not be released from the Custom House unless on a re-examination called for by the importer the finding of the Examiner shall be found to be erroneous" (Section V.).

In case a re-examination by the Board of Appraisers is demanded, if the board finds the tea equal to the standards, "a permit shall be issued by the Collector for its release and delivery to the importer, but if it be found inferior the importer must give a bond, with security satisfactory to the Collector, to export said teas within a period of six months," and if the same shall not have been exported within the specified time the Collector at the expiration of that time shall cause the same to be destroyed.

Acting under the authority of the statute and as required by its provisions, the Collector in this case refused to permit the importer to remove the goods for consumption, and the importer was by his conduct placed in the position where he was either compelled to remove the goods or suffer their destruction.

The evidence shows that the loss and expense incurred in the removal of the goods amounted to $2,281.19 (fols. 67, 161).

The plaintiff duly protested against the action of the Collector (Exhibit 16, p. 32; Exhibit 17, p. 34).

1. *The teas having been entered for import at the Custom House, were in the control of the Collector.*

The goods were put into a bonded warehouse, under provisions of law, and the Collector thereupon became the official custodian of them on behalf of the Government.

Conrad v. *Pacific Ins. Co.*, 6 Peters, 262, 281.

Tracy v. *Swartwout*, 10 Peters, 80.

This is not a case where it is sought to hold the Collector liable for the negligence, misconduct or other wrongful act of a subordinate official, but to hold him liable for the duress of goods under a duty imposed upon him by an unconstitutional law. This case is directly within the authority of *United States* v. *Lee*, 106 U. S., 196, where an action in ejectment was held to be, in its essential character, an action of trespass, with the power in the Court to restore the possession to the plaintiff as part of the judgment, and the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this Court held to be unlawful, and, therefore, insufficient as a defense (*Tindall* v. *Wesley*, (67 U. S., 119).

It is like the case of a defendant who has the key of a warehouse in which are the plaintiff's goods, put there no matter how, which the plaintiff cannot reach unless the defendant unlocks the door or authorizes somebody to do so. If he gives public notice that he will not permit the goods to be removed unless the plaintiff complies with an unlawful exaction, he is guilty of duress and conversion of the plaintiff's goods, and he cannot escape liability by saying that some subordinate placed the goods in the warehouse.

In Cruikshank *v.* Bidwell (176 U. S., 73), speaking of this statute, it was said: "The official character of the Collector, the provisions of the Act, and the regulations of the Secretary of the Treasury in exe-

cution thereof would not constitute a defense if the act were unconstitutional." That was a suit for an injunction restraining the Collector from refusing to permit the plaintiff to import tea, as well as from destroying tea under the act.

There is a long line of authorities holding that officials, acting under unconstitutional statutes which, therefore, are ineffectual to protect them, are liable for damages sustained by their wrongful act or where officials have been restrained from proceeding to enforce such unconstitutional law.

Osborn v. *Bank*, 9 Wheat., 738.
Poindexter v. *Greenhow*, 114 U. S., 270.
Pennoyer v. *McConnaughy*, 140 U. S., 1.
Smith v. *Ames*, 169 U. S., 466.
Scott v. *Donald*, 165 U. S., 56.
Tendal v. *Wesley*, 167 U. S., 204.

The same thing is true whenever an official, exceeding his lawful powers, inflicts an injury under color of office.

Siegfried v. *Phelps*, 40 Fed. Rep., 660, is an authority directly in point. That was an action to recover the value of a certain shipment of tea, arising out of the refusal of the Collector to permit the tea to be entered without presenting to him an invoice having indorsed thereon the declaration required in the case of dutiable articles. The plaintiff's contention was that the Collector had no authority to make a regulation requiring such a certificate. There was a demurrer to the complaint, which was overruled upon the ground that the Collector had no authority to exclude the teas because the certificate was not furnished. The judgment of the Court was that "the Collector unlawfully refused to allow the entry and is liable."

Other authorities to the same effect are,

Leslin v. *Hedden*, 28 Fed. Rep., 416, and
Pascal v. *Sullivan*, 21 Fed. Rep., 496.

2. *The rule that an officer is not liable for the tortious acts of his subordinate has no application where the act performed is a duty imposed by a law.*

> "There can be no doubt that the Collector is answerable for all the acts of his deputies in the performance of their official duties under him. The real question here is, therefore, whether the collection of the carrier's charges was a part of the official duty of the Collector. If it was, the collection by the deputy was an official act, and the principal officer was liable accordingly."
>
> *Cleveland, &c., Ry. Co.* v. *McCluug*, 119 U. S., 454.

See also

Belknap v. *Achild*, 161 U. S., 10, 18.
Iselin v. *Hedden*, 28 Fed. Rep., 416.
Head v. *Porter*, 48 Fed. Rep., 482.

The cases relied upon by the defendant were not cases where the subordinate was performing an official duty required by law to be done by the superior officer or under his direction, but were unauthorized acts.

3. *Where a public officer has established a regulation in the course of business that he will not do a certain act except upon certain terms which are illegal, or that he will not accept payment except upon conditions that he has no right to impose, a tender and demand are waived.*

Two experienced officials of the Custom House were called to show the course of business as established in addition to the regulations established by the Secretary of the Treasury under which the Collector refused to receive duties until after the teas had been passed by the examiner or Board of General Appraisers, or to grant a permit for their removal from a warehouse without first obtaining a report of the tea examiner or of the Board of General Appraisers that the teas are equal to the standard (p. 17, fol. 20; pp. 18, 19, 20). It would have been a useless cere-

mony, therefore, for Mr. Buttfield to have tendered the duties or to have demanded the teas. The tender and demand were, therefore, waived.

U. S. v. *Lee* (106 U. S., 196) is a direct authority on this point, where Mr. Justice Miller, reviewing the authorities, cited with approval the following language: "It is a general rule that when a tender or performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused." In that case the land commissioners had established a rule under which they refused to receive taxes except from the owner in person; that if offered by his tenant, agent or attorney in fact, it would be rejected. It was held that it would be an idle ceremony for any of these to make the offer, and that an actual tender by such persons, as it certainly would not be accepted, need not be made. The Court said:

> "That the commissioners having in the execution of the law acted upon a rule which deprived the owner of the land of an important right, a right which went to the root of the matter, a right which has in no instance known to us, or cited by counsel, been refused to a taxpayer, a sale made under such circumstances is invalid as much so as if the tax had been actually paid or tendered."

So in *Swift* v. *U. S.* (101 U. S., 22), where the Internal Revenue Bureau illegally required certain commissions to be received in stamps instead of money. Receipts and settlements made in pursuance of that requirement were not voluntary so as to preclude the claimant from recovering back payment. No formal protest was made.

> "A rule of that character deliberately adopted and made known and continuously acted upon dispenses with the necessity of proving in each instance of conformity that the compliance was coerced."

This case stands, therefore, precisely as though Mr. Buttfield had tendered the duties, and the Collector having the teas in his control had refused on demand to permit him to bring the teas into the country, or to do anything else with them except to reship them. If this action was illegal he was liable in damages (Cruikshank *v.* Bidwell). No question was raised as to the sufficiency of the proof of damage.

VI.

If the act fixes a rule of exclusion, the Standard violates that rule and affords no protection to the defendant in the destruction or exclusion of the plaintiff's teas.

If the act can be construed as prohibiting from import certain kinds of teas only and so establishes a rule of exclusion, then three questions are presented: (1) What is the rule of exclusion? (2) Does the standard violate that rule? and (3) Are the teas in question entitled to import under the rule established by the act?

1. If the act fixes any rule of exclusion, it is one which excludes only unwholesome tea, and authorizes the Secretary of the Treasury to fix a standard of wholesomeness, the purity being measured by the wholesomeness; the quality being measured by the wholesomeness; and the fitness for consumption being measured by the wholesomeness, these three specifications being attributes relative to the wholesomeness of the teas as an article of food.

We have dwelt at so much length upon the language, history and character of the statute that it is unnecessary to restate the considerations which demonstrate the impossibility of sustaining the

statute as a legal and constitutional enactment, except by adopting this construction. In order to adopt it, however, the Court is compelled to subordinate the phraseology of the language to the title of the act, and to ignore the purpose of the legislation as disclosed by the Senate report and this construction of the Statute has been consistently repudiated by the government and by the courts.

2. Assuming that Congress excluded merely unwholesome tea, and authorized the fixing of standards as above stated of purity, quality and fitness for consumption relatively merely to the wholesomeness of the tea as an article of food, it follows that neither the Board nor the Secretary had the right to establish standards which would exclude wholesome tea, or to establish standards which, as to purity, quality and fitness for consumption, were based upon any other attributes than those relating to wholesomeness.

The Secretary of the Treasury cannot by his resolutions alter or amend the law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted.

U. S. v. *Eaton*, 144 U. S., 66–77.
Morrill v. *Jones*, 106 U. S., 466.
Tracy v. *Swartout*, 10 Peters, 80.
Teal v. *Felton*, 12 How., 284.

The discretion that the Secretary and Board have in establishing the standards is on this supposition to be exercised in ascertaining the fact of wholesomeness. It cannot extend the operation of the act. The evidence in this case demonstrates that the standards were fixed not to exclude unwholesome tea merely, but also to exclude teas which are perfectly wholesome, merely because of their inferiority in grade.

In the Bidwell case the evidence is that all the grades from No. 6 to 15 on the schedule (Exhibit 12, p. 24) are pure, wholesome and free from adul-

teration and fit for consumption, and admissible under the standards fixed previous to 1901 (fols. 51, 91, 92, 129).

In the Stranahan case the evidence was that the grades below the standard were perfectly fit for consumption down to No. 15. The standard excluded all Fychow and Wenchow teas; that these teas are ordinary subjects of commerce and are pure, wholesome and suitable for consumption (fols. 41, 43). The witness called by the Government testified that the tea in question was a pure tea but of a low quality (fol. 57); that the standard is a fine quality of tea. He adds, "In my opinion there were grades inferior to No. 7 which were perfectly pure, genuine tea leaves, free from adulteration and different from the standard only in the flavor. That was true in regard to these teas in question—the eight packages that they differed from the standard only in flavor, that is, the flavor in my opinion was decidedly inferior to the flavor of the standard, that is the only distinction that I found between these teas and the standard" (fol. 61). He also testified that there are teas produced which are pure but inferior in cup quality that were suitable for standards, but they could not be bought in necessary quantities for Government samples at the time the standards were fixed (fol. 62). It is thus demonstrated by the record in both cases that the standard excluded teas which neither in respect to their purity, quality or fitness for consumption were unwholesome, and were not within the rule of exclusion fixed by the statute if any rule was fixed thereby.

3. The evidence is conclusive and uncontradicted that the plaintiff's teas in both cases were pure, wholesome, fit for consumption, free from adulteration and in every way such as are entitled to be imported if the rule of exclusion has regard merely to wholesomeness.

It may be said that being Country Green teas, they were not free from coloring matter (Buttfield

v. Stranahan, Record, fol. 76); but Mr. Hewlett, the chairman of the board, testified that the teas in question were pure teas. The mere fact that green teas have coloring matter is no evidence that the teas are impure. The evidence is that the teas had no more coloring matter than the standard, nor did any of the lower grades of Country Green teas (fols. 76, 77).

It appears that out of the twelve hundred and ninety-eight packages of tea, the subject matter of the Bidwell case, nine hundred and sixty-three were rejected as "inferior to the standard in quality," and three hundred and thirty-five as "inferior in quality, smoky Fychows."

The eight packages, the subject matter of the Stranahan case, were all rejected "as inferior to standard in quality" (fol. 6).

The examiner is required to state the particular cause of each rejection, "whether it be on the ground of quality, character of infusion, dust, scum or admixture with foreign substance" (Regulation 29).

The regulations distinguish between quality and quality or character of infusion. Examiners are required to test all teas for "quality, for any foreign matter on the surface of the infusion, sometimes called scum, and for quality of infusion" (Regulation 20), and if inferior to the standard in any one of these requisites the tea shall be rejected, notwithstanding that it be superior to the standard in some other qualifications (Regulations 20 and 22).

Regulation 20 relates to examination for quality; regulation 21 to examination for quality of infusion or quality of infused leaf. The former relates to the taste and flavor of the tea, the latter to the character of the leaf; that is, the appearance of the leaf, and whether the mass of tea examined shows a larger quantity of exhausted or decayed leaf or foreign substance than the standard.

In the cases before the Court the teas were rejected as being inferior in quality, not as being inferior

in quality of infusion. Quality is to be ascertained according to customs of the tea trade (Regulation 20), and it is provided "that the quality must be equal to the standard, but the flavor may be that of a different district as long as it is equal in sweetness." The word "sweetness" relates to the general excellence of the tea as determined by taste and smell. It is ascertained by what is known as the cup test (Record, Buttfield *v.* Stranahan, fols. 36, 38, 44, 45, 60, 62; Record, Buttfield *v.* Bidwell, fols. 112, 113, 137, 140, 141, 146, 149). In comparing teas with the standard as to quality, the question to be determined is whether in taste and smell they are equal to the standard (above citations). The position of the Government is stated as follows: "That the act of 1897 authorizes the board to established standards which take into consideration not only purity and wholesomeness, but also quality, meaning thereby the attributes that are tested by the sense of smell and taste" (Bidwell case, Record, fol. 54).

It is not open to question that in the Bidwell and Stranahan cases the teas were rejected by the examiner and by the Board of General Appraisers simply because they were not found to be equal to the standard in cup quality; that is, in delicacy of taste and smell. Some of the teas in the Bidwell case were rejected upon the ground of quality, with the additional statement that they were "smoky Fychows." But on appeal to the Board of General Appraisers all the teas were rejected as inferior in quality (Bidwell record, p. 16). There is no reason to assume that because teas have a smoky flavor, they are therefore unfit for consumption, or that they are unwholesome.

VIa.

If the Act fixes a rule of exclusion the teas in the Stranahan and Bidwell cases were wrongfully rejected.

Assuming that the Act fixes a rule of exclusion and that the expressed intention was to exclude unwholesome teas, such as by reason of their want of purity were unwholesome, or such as by reason of their quality were unwholesome, or such as by reason of their unfitness for consumption were unwholesome, and that the Board and Secretary were authorized to fix standards as administrative acts for the exclusion of such teas, then the teas in question were improperly rejected.

The evidence is conclusive in each of these cases that the teas were equal to the standard in purity, wholesomeness and fitness for consumption and in every attribute of quality except in taste and flavor.

The plaintiff in error was entitled to show upon the trial that the teas were equal to the standard. He was not precluded from doing so by the finding of the examiner or by the finding of the Board of General Appraisers because he was not a party to either of those findings. The Act did not provide for notice to him of either proceeding, nor does it appear that he had notice of either proceeding. He was, therefore, at liberty to bring his action against those who wrongfully interfered with his property, or prevented him from exercising his legal rights of ownership, and the Collector in this action cannot rely upon the finding of the examiner or of the Board of General Appraisers as a justification for the destruction of the teas, or for his action in excluding them from import.

People ex rel. Copcutt vs. *Board of Health*, 140 N. Y., 1.

VII.

In the Seven Package case the plaintiff in error is not estopped from questioning the constitutionality of the act and in that case the judgment was erroneous if the act was unconstitutional.

The action was brought to enforce a forfeiture pursuant to the ninth section of the act, cited *supra*, page 16. The right of recovery was grounded in the act itself. If the act was invalid, there was no right of recovery (see opinion of Thomas, *J.*, Record, p.).

1. It was claimed by the Government in the Court below that the plaintiff was estopped by reason of having given a bond, after their rejection, for the removal of the goods, from denying the constitutionality of the act. The bond was given under duress. The importer must remove his goods or suffer them to be destroyed. If the act was unconstitutional the bond was plainly void as being without consideration, and extorted by duress, and the giving of the bond under such circumstances would not operate as an estoppel.

O'Brien v. *Wheelock*, 184 U. S., 450.
Coburn v. *Townsend*, 103 Cal., 233.
Am. & Eng. Ency. of Law (2d ed.), vol. 4, p. 667.

Moreover, the averment in the information as to the bond was impertinent to the issue and, therefore, was not admitted by the demurrer. The right of forfeiture, if one existed, was shown by the statement that the teas were imported, rejected, exported and reimported. These are the only facts necessary to a forfeiture under the act. The Government is not in this action seeking to enforce the bond.

2. If the act was unconstitutional, either (1) because it deprived the plaintiff of his property without due process of law, as argued under either head of the second point of this brief, or (2) because there was an attempted delegation of the legislative power, or (3) because the act did not provide for due notice, appearance or hearing upon the examination of the teas, the act was wholly void because it is impossible to sever the invalid provisions from the valid provisions, if there be any.

Pollock v. *Farmers' Loan & Trust Co.*, 158 U. S., 636.

Spraigue v. *Thompson*, 118 U. S., 93, 95.

Trade Mark Cases, 100 U. S., 98.

VIII.

The judgments in the cases of Buttfield v. Stranahan and Buttfield v. Bidwell should be reversed and the cases remanded with instructions to enter judgments in each case for the amount of damages proven, with interest and costs, and the judgment in the case of Buttfield, claimant, v. The United States, should be reversed and judgment directed for the claimant, dismissing the information.

All of which is respectfully submitted.

Dated New York, December 23, 1903.

JAMES L. BISHOP,
JAMES H. SIMPSON,
Counsel for Plaintiff in Error.

[L6045]

AN ACT TO PREVENT THE IMPORTATION OF IMPURE AND UNWHOLESOME TEA.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section three of this Act, and the importation of all such merchandise is hereby prohibited.

SEC. 2. That immediately after the passage of this Act, and on or before February fifteenth of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the persons so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation, or any other cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to or from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged upon the duty herein provided, shall be paid out of the appropriation for "expenses of collecting the revenue from customs."

SEC. 3. That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom-houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

SEC. 4. That on making entry at the custom-house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall give a bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true quality of each and every part of the invoice and accord with the specifications therein contained; or, in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him with the standards established by this Act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of tea to the collector or other

revenue officer to whom is committed the collection of duties, and said officer shall also draw or cause to be drawn samples of each line in every invoice and shall forward the same to a duly qualified examiner as provided in section seven: *Provided, however*, That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be), under the provisions of this Act.

SEC. 5. That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality, and fitness for consumption to the standards hereinbefore provided, and no reexamination shall be demanded by the collector as provided in section six, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the customs authorities; but if on examination, such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality, and fitness for consumption to the said standards the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom-house, unless on a reexamination called for by the importer or consignee the finding of the examiner shall be found to be erroneous: *Provided*, That should a portion of the invoice be passed by the examiner, a permit shall be granted for that portion and the remainder held for further examination, as provided in section 6.

SEC. 6. That in case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal

in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reexamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, or merchandise described as tea, out of the limits of the United States within a period of six months after such final reexamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

SEC. 7. That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of the said ports which is nearest the port of entry, and that for this purpose samples of the merchandise, obtained in the manner prescribed by section four of this Act, shall be forwarded to the proper port by the collector or chief officer at the port of entry; that in all cases of examination or reexamination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this Act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

SEC. 8. That in cases of reexamination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such

board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples, and the papers therewith, to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

SEC 9. That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition.

SEC. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations.

SEC. 11. That teas actually on shipboard for shipment to the United States at the time of the passage of this Act shall not be subject to the prohibition hereof, but the provisions of the Act entitled "An Act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto.

SEC. 12. That the Act entitled "An Act to prevent the importation of adulterated and spurious teas,"

approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this Act goes into effect.

Approved, March 2, 1897.

Regulations.

The following are a portion of the regulations for the entry and examination of imported teas:

I. The importation of any merchandise for sale as tea which is inferior in purity, quality, and fitness for consumption to the standards fixed and established by the Secretary of the Treasury, in accordance with section 3 of the tea act, is prohibited.

Importations of tea may be entered either for consumption, warehouse, warehouse and transportation, warehouse and immediate exportation, transit to Canada or Mexico, or for immediate transportation without appraisement, and all entries must be on the regular forms, and the regular serial numbers for both bonds and entries should be used. (T. D. 18065, 20014, 21913.)

Tea entered for consumption must be stored in warehouse pending examination, and special bond must be taken by the collector as provided in section 4, act March 2, 1897.

A bond shall be taken from the importer that such tea shall not be removed from the warehouse until released by the collector. This bond (Cat. No. 821) shall be under a penalty equal to double the amount of the estimated duties on the tea, and shall also be conditioned for the payment of all custom house charges which may attach to the merchandise prior to its being released, exported, or destroyed, as the case may be, under the provisions of law.

II. The examination of teas shall be made by means of samples to be drawn from packages designated by the collector and to be furnished by the importer, and of additional samples to be obtained by

the examiner. The importer shall furnish a sworn statement that any samples submitted by him to the examiner are drawn from packages designated by the collector and covered by his entry (naming the vessel), and that to the best of his knowledge and belief they represent the true qualities of each and every part of the invoice (including the proportion of dust), and accord with the specifications therein contained. The importer shall submit with his entry a chop list or specification of the several lines included in the invoice, and the collector shall select for examination packages representing the different lines. The examination and report upon such samples shall be made in accordance with the provisions of section 7 of the above act.

V. If, after examination, the tea is found not to be prohibited under the act, a permit shall at once be granted to the importer declaring the tea free from control of the customs authorities; but if, on examination, such tea, or merchandise described as tea, is found, in the opinion of the examiner, to come within the prohibitions of the law and of these regulations, the importer shall be immediately notified, and the tea, or merchandise described as tea, so returned, shall not be released by the custom-house authorities, unless on a reexamination called for by the importer the return of the examiner shall be found erroneous. Should a portion only of the invoice be passed by the examiner as correct, a permit of delivery shall be granted for that portion and the remainder be held as provided in section 6 of the act. Any portion of an importation of tea entered for consumption which may be rejected will be held under the special tea bond until it is either destroyed or exported according to law, and the entry is not to be accounted for to the Treasury Department in the warehouse and bond account.

VI. In case the collector, importer, or consignee shall protest against the finding of the examiner,

the matter in dispute shall be referred for decision to a board of three United States general appraisers, designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reexamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, as provided in these regulations.

XI. The examination of tea by examiners or boards of United States general appraisers under this act shall be made according to the usages and customs of the tea trade, including the testing of an infusion in boiling water, and, if necessary, chemical analysis.

XII. Warehouses for the storage of tea will be designated by the collector, and the proprietor thereof will be required to give a bond in the form prescribed. Teas not stored in such designated warehouses will be placed in general order store or in public store pending examination and release on proper permit. In the absence of proper storage facilities at custom-houses, teas may be retained in locked cars as constructive warehouses, under proper supervision, pending examination.

The importer's premises may be designated as warehouses for the storage of tea, on the filing of the bond provided for by these regulations, but whenever, in the discretion of the collector, it shall be considered desirable a storekeeper shall be assigned to the supervision of such premises at the importer's expense while the teas shall remain under bond therein.

XIII. When tea under examination is stored in any warehouse it must be so placed as to be separate from other merchandise, and so as to allow convenient supervision by customs officers. At ports where there are no bonded warehouses, class 2 or 3, the chief officer at the port will, when necessary, procure suitable premises for the temporary storage of any tea arriving at his port.

All expenses of storage, cartage, and labor must be paid by the importer.

XIX. The following are the standards selected by the board of tea experts, which are hereby fixed and established as standards under this act for the year 1901:

No. 1. Formosa Oolong.
No. 2. Foochow Oolong.
No. 3. North China Congou.
No. 4. South China Congou.
No. 5. India tea (use for Ceylon tea).
No. 6. Pingsuey, green tea.
No. 7. Country green tea.
No. 8. Japan tea, pan fired (use for sun dried).
No. 9. Japan tea, basket fired.
No. 10. Japan tea, dust or fannings.
No. 11. Capers (use for scented Orange Pekoe).
No. 12. Canton Oolong (*a*)
No. 13. Scented Canton (*a*)

COMPARISON WITH STANDARDS.

XX. In comparing with standards, examiners are to test all the teas on these points, namely: For quality, for any foreign matter on the surface of the infusion, sometimes called scum, and for quality of infusion. Quality shall be ascertained by drawing according to the custom of the tea trade with the weight of a half dime to the cup. The quality must

a These standards (Nos. 17 and 18 for the year 1900) continued in force.

be equal to standard, but the flavor may be that of a different district as long as it is equal in sweetness. As an illustration, a Teenkai may be equal to a Moyune, but a distinctly smoky or rank Fychow, or Wenchow of sour character, must not be considered as equal to the two first mentioned.

XXI. In order to test for floating coloring matter or scum, and also for the quality of infusion, a second drawing should be made of double the foregoing weight. Before disturbing the infusion examination should be made for any floating substance, and after pouring off the water the infused leaf should be taken out so as to exhibit the lower side which rested against the cup. Should the mass show a larger quantity of exhausted or decayed leaf or foreign substance than the standard, it shall be considered inferior in quality, and the tea must be rejected. In Greens and Japans particularly the brightness of the leaf should be considered as an evidence of quality.

XXII. Should a tea prove, on examination, to be inferior to the standard in any one of the requisites, viz, quality, scum, or quality of infusion, it shall be rejected, notwithstanding that it be superior to the standard in some of the qualifications. No consideration shall be given to the appearance or so-called style of the dry leaf.

XXIX. In all cases of rejections by examiners, the importer should be notified of the reason for rejection—that is, whether it be on the ground of quality, character of infusion, dust, scum, or admixture with foreign substance.

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54TH CONGRESS, 2d Session. } CALENDAR No. 1678. SENATE. { REPORT No. 1527.

ADULTERATED TEA.

February 23, 1897.—Ordered to be printed.

Mr. WHITE, from the Committee on Commerce, submitted the following

REPORT.

(To accompany S. 3725.)

The Committee on Commerce, to whom was referred the bill (S. 3581) to prevent the importation of impure and unwholesome tea, beg leave to report that the same has been carefully examined, and a substitute (S. 3725) for said bill is herewith presented, with the recommendation that the same do pass.

The committee not only took evidence upon the subject, but likewise submitted the original bill to the Secretary of the Treasury, who reported a draft of a substitute, which is practically identical with the proposition herewith recommended for passage. The subject of the regulation of the importation of tea and the exclusion of impure teas has heretofore engaged the attention of Congress. An effort was made to remedy the evils justly complained of by an act entitled "An act to prevent the importation of adulterated and spurious teas," approved March 2, 1883. That measure, however, has failed to accomplish its purpose, but its operation has suggested defects which can be cured and which it is believed will be remedied by the enactment of this measure. It is well known that the people of the United States receive on an average poorer teas than the consumers of any other civilized country.

Much of the merchandise sold as tea is unwhole-

some and is disposed of at an enormous profit. These facts account for the circumstance that while the *per capita* consumption of tea is increasing in Great Britain statistics show a decided reduction in this country. The Treasury Department is fully alive to the situation and has co-operated with the committee as already stated.

Among the various arguments presented to the committee in favor of the present bill we find the following, which quite fully explains the object in view and the defects in previous legislation designated to be remedied. The same is herewith submitted:

LAW TO REGULATE ADULTERATED TEA.

Object of the present law.—The original law was constituted to prevent the sale of the tea unfit for use. Inspectors appointed by the Government at about thirty or more ports of entry were authorized to exclude teas which in their opinion contained adulterated or exhausted leaves, or were unfit for use. The importer was privileged to appeal from this decision and call for an arbitration, in which case the Government appointed an arbitrator, the importer one also, and the two arbitrators a third in case of disagreement, who decided the case. If the teas were excluded, they were to be taken out of the country or destroyed.

How the present law has worked in practice — The inspectors found that having no guide as to what constituted tea unfit for use, they were obliged to decide according to their own impressions of the moment—necessarily vague—which resulted in the shutting out of a tea to-day which would be admitted to-morrow. It has happened that the same identical tea divided up under different marks, has been unknowingly admitted and rejected by inspectors on the same day, under the supposition that the teas were different. It has frequently happened that teas excluded by one

inspector have been shipped to Canada or England and imported again through a different inspector at another port. Furthermore the same tea has been excluded and brought in again through the same inspector at the same port, simply because his views or those of the arbitrator in regard to adulteration and exhausted leaf would change from day to day.

Importers have imported the same grade of tea admitted during the previous season and found, to their consternation, that in the second season it was excluded, no reason being given beyond the inspector's or the arbitrator's impressions, which were without guide or standard of any kind. Consequently the importers have stood in constant danger of severe loss without remedy. The house of Purdon & Wiggin brought in about 5,000 packages, containing 40 pounds each, or, say, 200,000 pounds of Amoy tea, equal to millions of pounds imported for many years previous, but which were rejected after arbitration, causing the house a disastrous loss, which helped to bring about their final bankruptcy. A short time subsequently the same grade of tea, imported in large quantities by another house—say 10,000 packages, or more—was admitted after arbitration, thus giving an unfair advantage over the unfortunate competitor, both houses having imported in good faith, guided by what they had seen previously admitted.

This injustice, or series of injustices, has been going on for ten years. Not only the inspectors have no guide or standard by which to judge, but the arbitrators are likewise at sea, left entirely to their own vague impressions, which are constantly varying. It is a well-known fact that experts vary in their impressions of value, as proven continually by valuations of public auctions, in which the teas are never valued the same by different brokers, but frequently at 20 and 30 per cent. variation.

As many teas fit for use may have some quantity of adulterated or exhausted leaf, it is impossible to determine exactly where the line should be drawn.

Consequently some importer is always suffering injustice by having his teas rejected, which are fully equal to another's whose teas are admitted.

All this injustice may occur while inspectors or arbitrators are strictly honest, but without any standard or guide for their judgment. But it is difficult to estimate the disaster if any should not be honest. No inspector or arbitrator can be challenged because he has gone by his impressions, which the law allows. No two leaves of tea are exactly alike, and hence all could guess or decide as they choose without danger of being proven dishonest. Hence favoritism of all kinds has crept in. The arbitrators stand by their friends in many cases, inspectors by their impressions.

How arbitrations have failed.—The arbitrations have been in many cases a farce, and always variable and uncertain. The Government selects an arbitrator generally who is well known to be in favor of rigid exclusion. Importers select one generally known for great leniency in admitting everything. They seldom or never agree. Hence a long struggle to agree upon a third arbitrator who shall decide. In some cases a full month has elapsed before a third man can be agreed upon. The arbitrations with few exceptions result in leaving the decision to the third judge, who, like the inspectors, goes sometimes by his momentary impressions, which frequently contradict his own previous decision, or sometimes by motives of policy or friendship; in any case resulting in injustice either to importers or to the public.

The consequences of the present law.—The consequences of the present law are that millions of pounds of tea unfit for use are being constantly admitted. The public of the United States are now drinking the lowest average grade of tea ever before known, while many consumers are giving up tea altogether. The public are suffering; the importers

are suffering; and all because there is no standard or guide to govern the inspectors or arbitrators in the admission of the article.

The remedy.—After many years of injustice it is now proposed to amend the law so that the inspectors or arbitrators shall possess standards to guide them and thus admit and reject uniformly. Tne remedy proposed is to constitute a permanent committee or board of well-known merchants or experts to be appointed by the Secretary of the Treasury in the leading ports, whose duty it shall be to determine the lowest grade of tea fit for use, purchase enough of same for a standard, say, five packages of each kind, to enable all importers and inspectors to possess a sample for their guidance. The importers can send these samples to their correspondents in China and Japan and instruct that no lower grade can be shipped. Should teas below standards be brought in the inspectors shall reject them and the importers shall have the right to appeal to the permanent board of arbitrators appointed by the Government, whose duty it shall be to decide the simple question whether the tea is equal to the established standard or not, thus taking the inquiry out of the realm of imagination or guess work or vague impressions and reducing it to a simple test in which the tea in question is compared to the established standard and drawn side by side, under which circumstances any ordinary judge of tea can decide accurately.

It is also proposed to confine the ports of entry to the leading cities where experts can readily be found, instead of permitting the teas to be brought in through dozen of smaller places where it is almost an impossibility to find a board of judges.

The effect of the amendment.—(1) The inspectors, having a standard to guide them, will admit and exclude tea with justice and uniformity. (2) The arbitrators for the same reason will admit and ex-

clude with justice and uniformity. (3) The honest importer can conduct his business legitimately, without fear of injustice and unfair advantages upon the part of the arbitrators. (4) The tea trade of the United States will be benefited by having trash, which is ruining the business and which has for many years constituted the principal part of the surplus supply, effectually excluded. (5) The consumers of the United States will be protected as never before from the imposition upon them of worthless rubbish and be sure of receiving an article fit for use.

Who have advocated the amendment.—The petition for this amendment has been signed by all the leading importers of tea in the United States, representing all the capital invested in the tea business in first hands. The petitions have been signed by all the leading importers and wholesale houses of New York, Chicago, Boston, Philadelphia, Portland, Baltimore, and San Francisco. Several of these houses are interested in importations to the extent of over 100,000 packages per annum, several more over 50,000 packages, and few or none less than 10,000 packages per annum, therefore they represent the most interested and most intelligent opinion on the subject. In addition, the Collector of the Port of New York, and the Appraiser having witnessed these abuses and irregularities, have decidedly approved of this amendment. The Assistant Secretary of the Treasury at Washington, Mr. Hamlin, who has thoroughly investigated the subject, has also written his approval.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

THE UNITED STATES *ex rel.* GEORGE HAMILTON, GEORGE C. CHOLWELL, MOURILYAN HEINMAN COMPANY, RUSSELL & COMPANY, AVERILL & COMPANY and WILLIAM J. BUTTERFIELD, vs. LYMAN J. GAGE, Secretary of the Treasury; GEORGE HEWLETT *et al.*, composing the Board of Tea Experts appointed by said Lyman J. Gage.	Law No. 44,757.

Opinion of Mr. Justice Bradley.

The petitioners pray for a writ of *certiorari* directed to Lyman J. Gage, Secretary of the Treasury, and to George Hewlett and other defendants, composing the Board of Tea Experts, commanding them to certify to this Court for review the proceedings, decisions and actions of said Board of Tea Experts in selecting, preparing and submitting to the Secretary of the Treasury the standard samples of tea for the year 1901, and all communications received by the Board from the Secretary of the Treasury, the Assistant Secretary of the Treasury, or the Solicitor of the Treasury, instructing said Board as to its powers and duties, and commanding Lyman J. Gage, Secretary of the Treasury, to certify to this Court all of his decisions, actions, proceedings and regulations

in fixing and establishing the standards of teas for the year 1901, and pray also that the Secretary of the Treasury, and said Board shall "*certify and return*" (1), Whether or not the Secretary of the Treasury did instruct the said Board, and the said Board did receive from the said Secretary instructions that the Secretary of the Treasury was authorized to fix and establish standards which would exclude the lowest grades of teas, without considering the question of their purity or fitness for consumption. (2), Whether or not the said Board selected said standards and the Secretary of the Treasury fixed and established the same on the instruction and belief that the Secretary of the Treasury was by law authorized to fix and establish standards which would exclude the lowest, and "*certify and return*," really make answer to eight further interrogatories of like form.

The petition shows that the petitioners, as individuals or firms, are importers of teas doing business in the City of New York, and that the business of each is materially affected by the standards fixed of purity, quality and fitness for consumption admitted to import into the United States under the Act of Congress of March 2, 1897, entitled "An Act to prevent the importation of impure and unwholesome tea." That George Hewlett and the others named compose the Board of Tea Experts appointed for the year 1901 by the Secretary of the Treasury pursuant to that act. That in March, 1901, this Board, claiming to act under and by authority of that act, prepared and submitted to the Secretary of the Treasury standard samples of tea, and in the same month the Secretary of the Treasury did fix and establish certain standards of teas, which were thereupon announced and directed by regulation. That the Board, acting in excess of their jurisdiction and powers, selected sample standards of teas which exclude from importation teas that petitioners had dealt in and desired to deal in that are pure, wholesome and fit for consumption and use, and that the

Secretary of the Treasury established them as standards in violation of law and of the rights of the petitioners. That the Secretary of the Treasury assuming to act under the authority of the Act of Congress specified, as promulgated, certain regulalations to carry out its provisions recited in the petition, which he was without jurisdiction to make, which operate to the injury of petitioners.

The petition fails to allege the residences of the several members of the Board of Tea Experts, or their place of official meeting.

A rule to show cause was issued, which was served upon Lyman J. Gage, Secretary of the Treasury, but not upon the other respondents composing the Board of Tea Experts, as they are non-residents.

For return to the rule, the Secretary of the Treasury demurred to the petition.

The statute referred to in the petition provides in Section 1, that from and after May 1, 1897, "it shall be unlawful to import or bring into the United States any merchandise as tea, which is inferior in purity, quality and fitness for consumption to the standards provided in Section 3 of this Act, and importation of all such merchandise is hereby prohibited."

SEC. 2. That on or before February 15th of each year the Secretary of the Treasury shall appoint a board to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea.

SEC. 3. That the Secretary of the Treasury, upon the recommendation of the said Board, shall fix and establish uniformity of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the Custom Houses of the ports of New York, Chicago, San Francisco and such other ports as he may determine duplicate samples of such standards; that said Secretary shall procure a sufficient

number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports doing the same at cost. All teas or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the First section hereof.

The remaining sections of the act relate mainly to administration, and are not of importance to the consideration of the question raised by the demurrer, except the latter part of Section 7, which provides that in all cases of examination of teas sought to be imported "under the provisions of this act, the purity, quality and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis."

In plain terms, the statute requires the Board of Tea-Experts, whose appointment is provided for, to prepare and submit to the Secretary of the Treasury standard samples of tea, and requires the Secretary of the Treasury upon the recommendation of the Board to fix and establish uniform standards, and to deposit in the custom houses of various ports of the country, duplicate samples of the standards. The standard to be established is a sample of tea, not a descriptive regulation, and the question whether the tea brought into the country comes up to the standard, must be answered by a test that demonstrates the fact to the senses.

The duty of the Board of seven members, each of whom must be an expert in teas, is not to hear the importers, or to pass upon the merit of the teas that they severally handle, not to examine witnesses or to take testimony, but, using their expert knowledge, with the aid of their senses, to select samples of tea that in their judgment are of the purity, quality and fitness for consumption that justify their use as standards.

The duty of the Secretary of the Treasury is to

fix and establish standards upon the recommendation of the Board, and to cause duplicate samples of such standards to be placed in the several custom houses. His function appears to be executive.

The functions of the Board are not judicial.

The members are selected for their expert knowledge; they act upon their own inspection, and are at liberty to gain such information as they may require for the performance of their duty in any way, and from any available source. The examination of witnesses or the hearing of parties interested in the subject, or to be affected by the conclusions of the Board, is not contemplated by the statute.

Under Article 7, Section 8, Clause 3 of the Constitution of the United States, giving to the Congress power to regulate commerce with foreign nations, the power in that body to say just what teas, or whether any teas shall be imported into the United States, cannot be questioned. It is a part of the political power committed to it.

The fixing of standards of tea that may be imported would seem to demand specially equipped agents, such as the act in question authorized the Secretary of the Treasury to employ in aid of the duty imposed upon him. The performance of that duty by him, and the performance by the Board of its statutory duties involved the exercise of a part of the Government power, and the acts done are not subject to review by the courts.

Hughes *v.* Oaks, 59 Pa. St., 32–42.

The constitutionalty of the Act of Congress was conceded in argument at the hearing, and has been so adjudged.

Whether or not other reason exists for sustaining the demurrer, however, it must be sustained because neither the acts of the Secretary of the Treasury nor those of the Board, were judicial in their nature, and they cannot be reviewed upon *certiorari*.

Among the cases that might be cited in support

of this proposition, the following are deemed sufficient:

People *vs.* Bush, 40 Cal., 344.
People *vs.* Oakland, 54 Cal., 376.
Townshend *vs.* Copeland, 56 Cal., 612.
People *vs.* Supervisors of St. Lawrence Co., 25 Hun, 131.
People *vs.* McCarthy, 102 N. Y., 630.
People *vs.* Board of Health of Yonkers, 140 N. Y., 1.
Atty.-General *vs.* Northampton, 148 Mass., 589.
Devlin *vs.* Dalton, 171 Mass., 338.

The case of the People *vs.* Bush was an application for the writ of *certiorari* to review the proceedings of a county judge in appointing supervisors of the county. The Court held that "the appointment of the supervisors is, in its nature a ministerial and not a judicial act. Its nature is not dependent upon the quality or character of other acts which may be performed by the officer who makes the appointment. The writ does not extend to a mere ministerial act or proceeding though performed by a judicial officer."

In the case of the People *vs.* Oakland, the writ was sought to be used to review the action of a Board of Education in adopting certain text books for use in the public schools. The Board of Education of Oakland approved the report of a Committee that was in favor of adopting Appleton's series of readers. McGuffie's readers had been in use for a number of years prior thereto. The Court said "It is obvious that the defendant in its action with regard to the books to be used * * * was not exercising judicial functions. There was no party before it upon whose right it was passing with reference to any transaction whatever. Neither the party having a right to control the sale of one series of readers, or the other, was before it, prosecuting any right given to it by any law in existence. If present at

all, the party was there as any other person had a right to be, urging the policy of adopting the one series of readers, and the impolicy of adopting the other. The Board acted on the proposition before it as one of policy, or expediency, aiming to adopt that which in its judgment would be best for the constituency which it represented. Its action was then political or legislative and was in no proper sense judicial in its character. * * * To render it the exercise of a judicial function, its judgment must act in a matter which is judicial in the sense above indicated.

The case of the People *vs.* The Supervisors of St. Lawrence Co., was an application for a writ of *certiorari* to review the action of the Board of Supervisors of the county, delegating to a committee the locating and purchasing of a site for a children's home, the erection of a building and incurring an indebtedness therefor. The Court while holding that the Board was without power to delegate such authority, said:

"It is sought by this proceeding to review acts which are entirely legislative, executive and ministerial in character. The selection of a site for a Home, the incurring of expense in its purchase, the erection of an edifice thereon and the manner of its erection and the extent of the entire expenditure, rested in the discretion and judgment of the Board, and was legislative in character rather than judicial; as was indeed the subject itself, whether or not a site should be procured and an erection made. The carrying out and into effect, the determination, when made, would be executive and ministerial. There was nothing of a judicial character in the exercise of the power and authority of the Board over the subject. The action of the Board in that regard could not, therefore, be reviewed by *certiorari*.

In the case of the People *vs.* McCarthy, was an application for a writ of *certiorari* to review proceedings of the State Board of Equalization in

equalizing the apportionment of property within the State between the several counties for the purposes of taxation. The Court held that judicial review of conclusions based mainly if not exclusively upon the mental operations and the individual knowledge and qualifications of the persons composing the tribunals referred to, is obviously impracticable if not impossible" by *certiorari*.

The case of the People *vs.* the Board of Health of Yonkers was an application for a writ of *certiorari* to review the proceedings of the Board of Health in condemning mill ponds as nuisances. In its opinion the Court said:

"The Board of Health did act, and had a right to act upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party.

It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by *certiorari*," citing People *vs.* McCarthy, 102 N. Y., 630.

The case of the Attorney-General *vs.* Northampton was an application for a writ of *certiorari*, filed by the Attorney-General at the instance of the Civil Service Commission. In that case the Court held that

"The appointment of police officers by the municipal authorities of a city cannot, in any just sense, be called a judicial proceeding. It is an important administrative duty, and like most administrative duties involves the exercise of judgment and discretion; but it is administrative and not judicial in its character. No one has the right to be heard, and their decision is not, within the meaning of the law, an adjudication or judicial determination of any question or of the rights of the parties.

The case of Devlin *vs.* Dalton was an application for a writ of *certiorari* to review the proceedings of the Board of Military Examiners, discharging the petitioner from the position of Captain of Volun-

teers. The Court, citing the case of the Attorney-General *vs.* Northampton, said:

"Since in these proceedings the Board of Examiners did not act as a Court, the petition must fail because a writ of *certiorari* is issued only to review proceedings which are judicial in their nature."

The demurrer must be sustained and the writ denied.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

WILLIAM J. BUTTFIELD, PLAINTIFF IN error,
against
NEVADA N. STRANAHAN, COLLECTOR OF the port of New York.
} No. 294.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

This is the last of a series of cases which have been brought in different forms for the purpose of testing the constitutionality of the Tea-Inspection act of March 2, 1897, 29 Stat., 604. (*Sang Lung* v. *Jackson*, 85 Fed. Rep., 502; *Cruickshank* v. *Bidwell*, 86 Fed. Rep., 7; 176 U. S., 73; *Buttfield* v. *Bidwell*, 94 Fed. Rep., 126; 96 Fed. Rep., 328; *United States ex rel. Hamilton* v. *Gage*, Sup. Ct. Dist. Col., 1901; *Buttfield* v. *Bidwell*, No. 296 of this term.)

As appears by the record in the case last named (which was brought against the predecessor of the

present collector of the port of New York), the defendant claimed that the steps taken by Mr. Buttfield were not sufficient foundation for an action of tort, even if the statute were unconstitutional. The Bidwell case was tried October 22, 1902, and the nature of defendant's objection then disclosed to the plaintiff. In the following week, on November 2, 1902, Mr. Buttfield made upon the present collector a demand for eight packages of tea theretofore imported by the steamship *Adana*, tendering him the duties in full, and thus putting him in the position of a tort feasor in case of his refusal and of the unconstitutionality of the statute (pp. 11–12). The present action was commenced December 4, 1902, and tried in the following April before Judge Coxe and a jury. A verdict was directed for the defendant, and (a constitutional point being involved) a writ of error taken directly to this court.

STATEMENT OF FACTS.

The importation of the eight packages of tea in the *Adana* was made in January, 1902. The proper steps were taken by the plaintiff for the purpose of entering and bonding the teas and having them examined for the purposes of the tea-inspection act. They were not rejected for impurity or unwholesomeness, but they were found to be "inferior to standard in quality." It is admitted that they were reasonably pure and not deleterious to health, but that they "were in fact inferior in

quality to said standard, provided that by 'quality' is meant taste and flavor" (pp. 10, 11). Plaintiff nevertheless tendered the duties and demanded a permit to withdraw the tea for consumption. The collector refused on the ground that the withdrawal was not "in accordance with the requirements of article 1308, Regulations of 1899" (pp. 11–15); that is, the act of 1897 (p. 16). Plaintiff then requested an export withdrawal permit, so that he could ship the teas out of the country. This also was refused on the ground that "the six months fixed by the act of March 2, 1897, within which exportation is allowable has already expired" (pp. 16, 17). The collector thereupon ordered the teas to be sent to the United States public stores for destruction, and they were accordingly there destroyed (pp. 10–17).

THE ACT OF 1897.

This is entitled "An act to prevent the importation of impure and unwholesome tea." Section 1 provides as follows:

> That from and after May 1, 1897, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section 3 of this act, and the importation of all such merchandise is hereby prohibited.

Section 2 provides for the appointment by the Secretary of the Treasury on or before February

15 of each year of "a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea."

Section 3 is as follows:

> That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom-houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

Section 4 provides that on entering any tea at the custom-house the importer or consignee shall give a bond to the collector that it shall not be removed until released by him, "after it shall have been duly examined with reference to its purity, quality, and fitness for consumption;" the examination to be made by an examiner of teas.

Section 5 provides for such examination.

Section 6 is as follows:

That in case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reexamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, or merchandise described as tea, out of the limits of the United States within a period of six months after such final reexamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

Section 7 is as follows:

That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry, and that for this purpose

> samples of the merchandise, obtained in the manner prescribed by section 4 of this act, shall be forwarded to the proper port by the collector or chief officer at the port of entry; that in all cases of examination or reexamination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

Section 8 contains administrative regulations concerning the reexamination by the Board of General Appraisers and provides that the decision of the Board shall be in writing and shall be transmitted to the collector—

> who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The Board of United States General Appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

Section 9 provides that no rejected teas which have been exported under the provisions of the act shall be reimported under penalty of forfeiture.

Section 10 empowers the Secretary of the Treasury "to enforce the provisions of this act by appropriate regulations."

THE TREASURY REGULATIONS.

The Treasury Regulations which were in effect at the time of the importation of these teas are matter of which this court may take judicial notice. (See *Caha* v. *United States*, 152 U. S., 211; *Cosmos Co.* v. *Eagle Co.*, 190 U. S., 301, 309.) The important passages are contained in the record in case No. 296. They are as follows:

> XI. The examination of tea by examiners or boards of United States general appraisers under this act shall be made according to the usages and customs of the tea trade, including the testing of an infusion in boiling water, and, if necessary, chemical analysis.
>
> XIX. The following are the standards selected by the board of tea experts, which are hereby fixed and established as standards under this act for the year 1901:
>
> No. 1. Formosa Oolong.
> No. 2. Foochow Oolong.
> No. 3. North China Congou.
> No. 4. South China Congou.
> No. 5. India tea (use for Ceylon tea).
> No. 6. Pingsuey, green tea.
> No. 7. Country green tea.
> No. 8. Japan tea, pan fired (use for sun dried).
> No. 9. Japan tea, basket fired.
> No. 10. Japan tea, dust or fannings.
> No. 11. Capers (use for scented Orange Pekoe).
> No. 12. Canton Oolong. (a)
> No. 13. Scented Canton. (a)

COMPARISON WITH STANDARDS.

XX. In comparing with standards, examiners are to test all the teas on these points, namely: For *quality*, for any foreign matter on the surface of the infusion, sometimes called *scum*, and for *quality of infusion*. *Quality* shall be ascertained by drawing, according to the custom of the tea trade, with the weight of a half dime to the cup. The quality must be equal to standard, but the flavor may be that of a different district as long as it is equal in sweetness.[a] As an illustration, a Teenkai may be equal to a Moyune, but a distinctly smoky or rank Fychow, or Wenchow of sour character, must not be considered as equal to the two first mentioned.

XXI. In order to test for floating coloring matter or *scum*, and also for the *quality of infusion*, a *second drawing* should be made of *double the foregoing weight*. Before disturbing the infusion examination should be made for any floating substance, and after pouring off the water the infused leaf should be taken out so as to exhibit the lower side which rested against the cup. Should the mass show a larger quantity of exhausted or decayed leaf or foreign substance than the standard, it shall be considered inferior in quality, and the tea must be rejected. In Greens and Japans particularly the brightness of the leaf should be considered as an evidence of quality.

[a] A trade term referring to tea flavor, not saccharine flavor.

XXII. Should a tea prove, on examination, to be inferior to the standard in any one of the requisites, viz, quality, scum, or quality of infusion, it shall be rejected, notwithstanding that it be superior to the standard in some of the qualifications. No consideration shall be given to the appearance or so-called style of the dry leaf.

XXIX. In all cases of rejections by examiners, the importer should be notified of the reason for rejection—that is, whether it be on the ground of quality, character of infusion, dust, scum, or admixture with foreign substance.

HISTORY AND OBJECTS OF THE STATUTE.

It is well settled that in construing an act not only is prior legislation *in pari materia* to be considered, but also it is important to examine the original form of the bill and the way in which the amendments thereto were inserted, for which purpose the journals of Congress may be considered (*Blake* v. *National Banks*, 23 Wall., 307; *Legal Tender Cases*, 12 Wall., at p. 559; *United States* v. *Burr*, 159 U. S., at p. 85; *Chesapeake Co.* v. *Manning*, 186 U. S., 238, 245), and (while it is not permitted to examine the debates of Congress), it is proper to examine the reports of Congressional committees, upon which reports the action of Congress was based. (*The Delaware*, 161 U. S., 459, 472.)

The former act *in pari materia* was the act of March 2, 1883, ch. 64 (22 Stat., 451), entitled "An

act to prevent the importation of adulterated and spurious teas." The first section of this act prohibited the importation of "any merchandise for sale as tea adulterated with spurious leaf or with exhausted leaves or which contains so great an admixture of chemicals or other deleterious substances as to make it unfit for use." The act provided for an examination of the merchandise "with reference to its purity and fitness for consumption" (section 2). "Exhausted leaves" were defined to "mean and include any tea which has been deprived of its proper quality, strength, or virtue by steeping, infusion, decoction, or other means" section 6). It will be noticed that the act treated the specific things prohibited under the first section as including whatever was inconsistent with the purity and fitness for consumption of the tea.

In practice the phrase "deleterious substances" came to have a very broad signification, including not only substances other than tea, but also tea leaves which had suffered by careless picking or bad curing; and customs officers were as early as 1889, many years before the passage of the present act, cautioned to secure a strict examination of teas of this character. Assistant Secretary Tichenor directed the collector of this port on July 30, 1889 (Syn. Dec. 9534), as follows:

> The statements of the consul and the documents inclosed in his communication indicate that it is a well-recognized fact among dealers in China, that Amoy Oolongs

> are generally dirty, adulterated, carelessly picked or poorly cured, and their reputation is so vile that all markets, save that of the United States, are now closed to them.
>
> A circular letter issued by Messrs. Russel & Co., of Amoy, speaks of these teas as the decayed vegetable matter of China, and states that it is difficult to understand how, under the existing inspection regulations, they can be dealt in.
>
> * * * * *
>
> Your attention is called to this matter in order that a strict scrutiny may be made at your port of all importations of this grade of teas with a view to prevent the admission of any which may be found to be in violation of the act prohibiting the importation of adulterated and spurious teas.

The act of 1883 contained no provision for the establishment of Government standards, and its administration was far from uniform, both on this account and because the act left so wide a discretion in the examiner as to what is "deleterious"—for there is a very great difference of opinion as to the hygienic character of these low-grade teas such as described in the Treasury circular above quoted.

The act of 1897 as originally introduced was drafted for the double purpose of establishing definite standards in the interest of uniformity and broadening the statute by omitting all phrases which might restrict the meaning of the term "fitness for consumption." The bill was introduced January 22, 1897, by Senator Hill, and bears the

number 3581. It is entitled "A bill to prevent the importation of impure and unwholesome tea." It strikes out the words above quoted from the first section of the act of 1883, and substitutes therefor the words "any merchandise as tea which is inferior in purity or fitness for consumption to the standards provided in section 3 of this act." Section 3 provided for the adoption of standards and deposit of samples, the standards so fixed "to be the standards for *purity and fitness for consumption* of teas permitted or sold within the United States." The Secretary of the Treasury, through his power of confirming the recommendations of the board of tea experts, was thus made the arbiter of fitness for consumption as well as of purity; "fitness for consumption" was treated as equivalent to "wholesomeness;" and the word "unwholesome" was doubtless regarded as including everything which under the prior act had been considered "deleterious."

The bill was referred to the Committee on Commerce, which amended the bill in various respects, submitting the amended bill in the form of a substitute. (Senate bill 3725.) The only amendment important to the case at bar was the insertion of the word "quality" after the word "purity" at every one of the many points where the phrase "purity and fitness for consumption" occurred in the bill, so that the phrase should read "purity, *quality*, and fitness for consumption." With the substitute the committee presented a report drawn

by Senator White, of California. (Senate report 1527, Fifty-fourth Congress, second session, February 23, 1897.) The report stated that the committee had taken evidence on the subject and had submitted the original bill to the Secretary of the Treasury, who reported a substitute practically identical to the one now presented.

The report shows clearly that while the unwholesomeness of the teas to be excluded was borne in mind as an important element, the effect of the law was intended to be still more sweeping and to shut out the lowest grades of tea (or what was being sold as tea) altogether as "unfit for use." Among the consequences of the law of 1883, the committee reported that "millions of pounds of tea unfit for use are being constantly admitted," while our people "are now drinking the lowest average grade of tea ever before known, *while many consumers are giving it up altogether.*" The remedy proposed is the establishment of standards of the "lowest grade of tea fit for use." The effect of the amendment, in addition to the securing of uniformity by the establishment of standards, is stated as follows:

> (4) The tea trade of the United States will be benefited by having trash, *which is ruining the business* and which has for many years constituted the principal part of the surplus supply, effectually excluded.
>
> (5) The consumers of the United States will be protected as never before *from the imposition upon them of worthless rubbish* and be sure of receiving an article fit for use.

In fact, a great mass of very low-grade tea, or merchandise imported as tea, had come upon the American market and was being sold, which was of a quality regarded in the trade as worthless. Its effect was believed by a great majority of the trade (and, on their representations, by Congress) to be a fraud upon the consumer; so much so that it tended to drive tea out of consumption altogether in the districts where these low-grade goods had been most successfully worked off. Certain reckless importers, while making great profits for themselves, were thus not only giving opportunity for fraud by middlemen upon the consumer, but were inflicting injury in the long run upon the trade as a whole—an injury which would be shared by the United States Treasury whenever, as afterwards occurred, it might need the benefit of a revenue duty upon tea.

An example of the frauds from which the public is protected by this statute is to be found in the facts of this particular case as they came out upon the trial. Of course the people who drink tea drink it for its taste and flavor. They do not know when they buy the tea what the taste and flavor are going to be. Other things being equal, the best taste and flavor belong to what is called the Gunpowder tea, which represents the small leaves at the top of the tea plant; the difference in flavor between this Gunpowder tea and the Hyson, which represents the coarse leaves near the bottom of the tea plant, being very great. There are many

grades of tea plants, however, in each producing district, and the Hyson of a higher grade may be much better than the Gunpowder of a lower grade. Now, the ignorant consumer, or even retailer, not knowing of the existence of the great variety of grades recognized by these witnesses (as, for instance, the "Finest Wenchow," which is no better than tenth grade "Moyune"), is apt to select a beautiful-looking Gunpowder of a low grade instead of a Hyson of a much higher grade—that is, much superior in the attributes on account of which tea is actually consumed. Thus Mr. Buttfield here concedes that his imports (although Gunpowders) were inferior in taste and flavor to the standard (which is a Hyson); *yet the market price of the standard was 10 1-2 cents, while the market price of the rejected tea was 20 cents.* The wholesalers got this higher price for the inferior article because "people who buy tea from them buy it on the appearance and not on the taste and flavor" (pp. 30–31).

SUBSEQUENT ADMINISTRATION OF THE STATUTE.

In *Cruickshank* v. *Bidwell*, which was argued here in November, 1899, the Government brief contained the following statement concerning the administration of the statute up to that time:

> A great majority, as we are informed, of the persons constituting the tea trade of the United States—importers, jobbers, and retailers alike—have been led by their experience of the practical workings of this act to

give it their entire approval. No complaint has been heard from the consumers. The price to them has been raised little, if at all, while for the first time the tea consumed in the United States is now everywhere good. This great advance in our material comfort is the direct result of the act of 1897.

As above stated, the Secretary of the Treasury, aided by the boards of tea experts of 1897, 1898, and 1899, has used his best endeavors to fix standards so low that the cheapest teas which are pure and genuine, unaffected by foreign flavors and possessing the flavor of tea in substantial strength, can come freely into the United States. Cheaper grades are regarded as doubtful in purity, even though impurity can not affirmatively be shown. At the very start it was endeavored to establish a standard for each producing district. (*Syn. Dec.* 17995, April 21, 1897.) When the Sang Lung case above cited, and the complaints out of which it arose, showed that one district had been overlooked, it was immediately added by a supplemental order of the Secretary. (*Syn. Dec.* 18554, November 6, 1897.) Since the flavor is necessarily used as a test of fitness for consumption, it was also expressly ordered that it should be used only as an index for that purpose and not "limited to the particular characteristics of the tea district from which the standard comes." (Id.) By a subsequent circular it was directed "that the flavor may be that of a different district so long as it is equal in sweetness"

(*Syn. Dec.* 18933, February 7, 1898), the word "sweetness" being a trade term for the genuine tea flavor as distinguished from the smoky, sour, etc., flavors which sometimes affect it and are by some believed to be due to impurities.

We are informed that during the past four years, since the Cruickshank brief was submitted, general satisfaction among a majority of the trade and among consumers has continued. Almost without exception the standards of these four years have been so low that the cheapest genuine teas possessing the tea flavor in any substantial strength have continued to come freely into the United States. In 1901, however, the standard of one particular district out of the thirteen (see Regulation XIX, *supra*) was fixed so high that during the following year a considerable amount of reasonably pure tea of reasonably good quality was non-importable. This arose through one of those practical difficulties that must occasionally occur in the administration of any statute. It is of course necessary, in order to carry out the objects of any such system, to obtain for use in the market a certain number of chests of tea from each district which shall be absolutely uniform as to purity and quality. This is because the samples must be distributed not only to the custom-houses at all the principal ports of the United States and to all the large dealers in the country, but also to all persons in the tea-raising country who are engaged in buying for

export to the United States. The foreign buyer, the American importer, and the Government examiner must all have samples which are absolutely uniform in every respect; otherwise the administration of the act would be accompanied with gross unfairness and serious injury to the trade. It is therefore incumbent upon the Board of Tea Experts in fixing the standard for a particular district to obtain a certain number of chests of tea which shall be uniform, and as near as may be combine the *minimum* permissible of purity with the *minimum* permissible of quality. It may be that a trifling amount of tea is obtainable which, while of lower quality still than the standard selected, would be proper for selection if a sufficient amount of uniform quality could be obtained; but because not enough is obtainable it must be rejected. On the other hand, teas which would pass muster as to quality may be so impure that they have to be rejected as standards on that account.

Now this is what actually happened in the case of country green teas in 1901, as described in the testimony of Mr. George Hewlett, who has been the chairman of the Board of Tea Experts for the past five years (pp. 27–29):

> When this standard of 1901 was adopted I was a member of the board; that board consisted of seven members, two from New York, two from Chicago, one from Boston, one from Philadelphia, and one from San Francisco. Once a year all the members

attended at the sessions of the Tea Board. All the members attended at various sessions. Every member was not present all the time that the board was in session. In my opinion the quality, using the phraseology of Exhibit 8, of the tea which was selected as the standard by the board was a Hyson of a fine Teenkai chop. By a Hyson I mean one of the last lines in an invoice of green tea made out of the coarsest leaf on the invoice. It is made out of the coarsest leaf, and the Gunpowder is the finest leaf, and there is a gradation between Hyson and Gunpowder, so that by selecting a Hyson of a fine Teenkai we select the coarsest and poorest of that fine Teenkai. * * * At the time this Hyson of a fine Teenkai was selected as the sample, the board made diligent search for any teas of lower grades—Hysons of lower grades—of pure teas in the New York market and obtainable by the trade, speaking of country green teas, and were unable to find any. * * * In my opinion there were no teas in the market at that time when the standard was selected that could have been obtained that were pure and that were inferior in cup quality to these teas which were selected as the standard, because I took pains to have diligent search made for such teas as could be bought in the necessary quantity for use as Government samples, and while such teas are produced they were not available for selection when the board was in session for the selection of samples.

True, the plaintiff and his expert witnesses claim that there were large amounts of country green tea of lower quality than the standard which were pure enough to have been admitted under the standard of the previous year; but they do not claim to have used the same care in testing for purity as is required by the Treasury Regulations (p. 33; see Regulation XXI, *supra*). The rejection of these teas was due to the opinion of the Board of Tea Experts that they had too much coloring matter. The witnesses conceded that they contained coloring matter, though claiming that there was not enough to do any harm (p. 34).

The recurrence of such a difficulty was immediately provided against, however, by the adoption, upon recommendation of the Board of Tea Experts, of the following regulation of 1902 (Regulation XX as amended):

> In examining Japans, Green Teas, and Congous, while limiting the comparisons in the matter of infused leaf and scum to the specific standard called for, examiners are to admit teas upon the question of quality, in the three kinds above cited, provided they are equal, in the case of Japans, to either the pan-fired or the basket-fired standard; in Greens, to either the country tea or the Pingsuey standard, and in Congous, to either the North China or the South China standard.

It should be noted that the use of the standard takes away the arbitrary character of the test by taste and smell. It does not take an extraordinary expert to compare two samples of the same variety of tea and ascertain which is the higher. That is all that comparison with the standard requires. Few persons have an accurate sense of absolute pitch in music, but most are able to tell whether one note is higher than another.

We respectfully submit to the court that every intendment is in favor of the constitutionality of the act (I); that under its power to regulate commerce with foreign nations Congress may exclude any article from such commerce without encroaching upon the liberty of the citizen (II); that it intended, for sufficient reasons, to exclude teas of inferior quality, although they might be sufficiently pure and not deleterious to health (III); that so far as the determination of the proper standard of quality was delegated to the Secretary of the Treasury such delegation was proper and actually necessary to effectuate the legislative intent (IV); that due process of law has not been denied to the plaintiff (V); and that plaintiff has not been damnified (VI).

I.

Every intendment is in support of the constitutionality of the act.

The rule was laid down as follows by Mr. Justice Peckham in the *Gettysburg Park case* (160 U. S., 668, 680):

> In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the Government.

Among other leading cases to the same effect we may cite *Pine Grove* v. *Talcott* (19 Wall., 666, 673); *Nicol* v. *Ames* (173 U. S., 509, 514–515); *Commonwealth* v. *Blackington* (24 Pick., 353, 355).

II.

The power to regulate commerce with foreign nations includes the power to prohibit the importation of these low-grade teas.

The truth of the proposition that Congress may exclude any article from foreign commerce was recognized by all of our early statesmen and constitutional writers and has never, so far as we are aware, been seriously disputed. During the first twenty-five years of our constitutional history Congress repeatedly went to the extent of prohib-

iting all foreign commerce whatever. When it did this by an embargo without limit of time—that is, when it passed what was in effect a permanent law abolishing all foreign commerce—the constitutional point was raised; but it was overruled by the district judge in Massachusetts (Hon. John Davis) in *United States* v. *Brigantine Williams* (2 Hall's L. J., 255, 28 Fed. Cas., 614). The point was not raised in any of the numerous cases under the embargo law which reached the Supreme Court of the United States, and the unlimited character of the power has since been conceded. (2 Story on the Constitution, secs. 1290, 1292; 1 Kent, 431–432). Thus for fifty years all drugs, medicines, and chemicals below a certain degree of strength have been excluded. (9 Stat., 237; Rev. Stat., sec. 2933 et seq.) The right to exclude any article from commerce with the Indian tribes, Congressional power over which is identical, is well settled (*United States* v. *43 Gallons of Whisky*, 93 U. S., 188, 194, 195); and it has recently been held that the right to regulate interstate commerce also implies the right to prohibit. (*Lottery Case*, 188 U. S., 321, 354, *et seq.*) Even the dissenting justices did not deny this implication as to the power to regulate commerce with abroad. (Id., p. 374.)

Indeed, the power of Congress to levy prohibitory tariff duties (that is, duties intended not for purposes of taxation, but to exclude certain articles from foreign importation altogether), when

so hotly challenged during the great disputes from 1824 to 1833, was based by Madison, Clay, Grimke, Verplanck, and its other leading defenders, solely upon the power to regulate commerce. Their arguments (which were set forth somewhat at length in the brief submitted on behalf of the Government in *United States* v. *Realty Company*, 163 U. S., 427, and more briefly in the *Lottery Case*, *supra*) received the indorsement of Mr. Justice Story (2 Story on the Constitution, § 1093).

In *Murray's Lessee* v. *Hoboken Land and Improvement Co.* (18 How., 272), the court pointed out that in considering whether a statute is consistent with due process of law it is of importance to consider the generally recognized practice in similar matters at the time of the adoption of the Constitution. Examination of the then prevailing practice as to the importation of foreign goods will show that it recognized no general right of importation at all. Indeed no policy was more common than that of limiting such commerce from any given foreign country to one or more individuals licensed by the legislature or the Executive for that purpose. (Leone Levi, History of British Commerce, 2d ed., pp. 30, 109, 235, 236; Adam Smith, Wealth of Nations, Book IV, Ch. I; New York Statute of March 15, 1781, ch. 29; 9 Hening's Virginia Statutes, 1778, p. 532.) From the start Congress wisely refrained from granting similar monopolies in time of general peace, but when commerce was, from time to time, laid under a

general embargo during the foreign wars, the right was recognized to give the President the right to issue similar licenses. (2 Stat., 500, 506.) The power to regulate commerce with the Indian tribes is contained in the same clause as the power to regulate foreign commerce, and is of equal scope. One of the early acts of Congress confined the right to trade with the Indians to persons holding special licenses. (1 Stat., 329.) Special acts of incorporation are of the same essential character.

The foregoing instances confirm the proposition that the power of Congress over foreign commerce is such that nobody can be said to have an inherent right to import goods; that the importation of goods from abroad is by permission of Congress; and that it is subject to such restrictions as Congress may see fit to impose and to the supervision of such officials as Congress may see fit to provide for that purpose.

The power to regulate commerce with foreign nations being an enumerated power, it is entirely unlimited so long as it does not violate any of the specific constitutional restrictions upon legislative authority. (*Lottery Case*, 188 U. S., 321, 353, 356.) An enumerated power is "distinct and independent, to be exercised in any case whatever." (*McCulloch* v. *Maryland*, 4 Wheat., at pp. 421–422; see *Doyle* v. *Continental Insurance Co.*, 94 U. S., 535, 541.) It acknowledges no limitations other than those prescribed in the Constitution. (*Leisy* v. *Hardin*, 135 U. S., 100, 108.) It may be used

for any lawful purpose. Thus, while Congress has no direct right to regulate agriculture and manufactures (*United States* v. *E. C. Knight Co.*, 156 U. S., 1), it may regulate commerce or adjust taxation for the encouragement of those industries. While it has no direct right to regulate the descent of real property in the various States, yet under the treaty-making power it can alter the laws of descent on behalf of the subjects of European nations. (*Hauenstein* v. *Lynham*, 100 U. S., 483, and cases cited; *Geofroy* v. *Riggs*, 133 U. S., 258, 266–267.)

The power of Congress over foreign commerce is much greater than that of the States over domestic production. The latter is not unlimited, but is restricted to that very indefinite sphere included within what is called "the police power;" yet even the States may prohibit the manufacture of an inferior article. (*Patapsco Guano Co.* v. *North Carolina*, 171 U. S., 345.)

III.

The intent of the statute is (and for proper reason) to exclude teas of inferior quality, though sufficiently pure and not unwholesome.

(*a*) *The legislative intent.* This was the question considered and decided in *Buttfield* v. *Bidwell* (96 Fed. Rep., 328) by the circuit court of appeals of the second circuit (Mr. Justice Peckham and Wallace and Shipman, JJ.). The opinion in that case, after going over the history of our legisla-

tion for the inspection of imported tea and specially referring to the amendments made by the Senate committee in its report upon the present act, said:

> As originally introduced in the House, the bill prohibited the importation of "any merchandise as tea which is inferior in purity or fitness for consumption to the standards provided in section 3 of this act." It was amended in the Senate by inserting the word "quality" between the words "purity" and "fitness for consumption" wherever they occurred in the House bill. The amendment evinces the intention of the Senate to authorize the adoption of uniform standards by the Secretary of the Treasury which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably or possibly so because of their inferior quality. The House concurred in the amendment, and the measure was enacted in its present terms. We conclude that the regulations of the Secretary of the Treasury are warranted by the provisions of the act.

The precise question argued in that case was whether the word "quality" should be disregarded as surplusage and the words "fitness for consumption" construed as equivalent to "wholesomeness." The question was purely one of statutory construction; for the plaintiff, in order to maintain an

appeal to that court from a preliminary injunction order, was obliged to waive his point of constitutionality. The phrase above quoted, "or presumably or possibly so because of their inferior quality," predicates the legislative intent to exclude tea of the lowest quality upon the well-known fact that these very low qualities are the ones in which adulterations difficult of detection most occur. It is to be remembered that these adulterations are not necessarily made with deleterious substances. In fact, food adulterations, although they be frauds, are more commonly harmless than not. The adulterations which Congress sought to prevent in the case of imported teas are adulterations by intermixture of the leaves of plants otherwise similar, but destitute of theine. Such adulterations can not be proved by any test for purity, but are detected by the sense of taste.

We have already stated the history of this enactment somewhat in detail. As the court said in the case just cited, it shows that the word "quality" was not unnecessarily amended into the bill for the purpose of constituting a mere surplusage, but "was industriously inserted to make the act a more stringent substitute for the existing legislation."

Even if the word "quality" had been part of the bill from its first introduction, proper rules of statutory construction would require that it be given independent force, for no unwholesome article is fit for consumption, and therefore if the

words "fitness for consumption" are equivalent to "wholesomeness" the word "quality" is left without any function in that regard. But, as said in *Market Co.* v. *Hoffman* (101 U. S., 112, 115–6):

> It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, section 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times.

The fact that the word was inserted in so many places by amendment, with a report stating an intent to exclude articles so low in quality as to be "ruining the business" and properly describable as "worthless rubbish," confirms the argument.

The term "quality," according to the Century Dictionary's general definition, means "Degree of excellence or fineness; grade, as the food was of inferior quality; the finest quality of clothing."

The trade meaning of the term is also independent of the questions of purity and wholesomeness. The Government test for "quality" is identical with that adopted by the tea trade, as is shown by the testimony of plaintiff's witnesses (Record, pp. 21, 23).

The act is to be considered according to its intent. It is remedial and to be construed as such, notwithstanding that the tea must be destroyed to

get rid of it if the importer refuses to send it away within six months after its rejection. (See *United States* v. *Stowell*, 133 U. S., 1, and cas. cit.)

The fact that the word "quality" is not contained in the title is immaterial. The explanation is obvious. The original bill was intended only to exclude teas that were impure and unwholesome. The title truly and completely stated the intent. When the Senate committee decided to broaden the scope of the legislation and exclude all of the lowest grade teas, the title was overlooked and remained in its original form. The fact that the title of the statute is narrower in scope than the statute itself is immaterial. The title may be used in construing a statute when the body of the statute is ambiguous; but the ambiguity must be found in the word to be construed or in its context, and not in the title. (*Patterson* v. *Bark Eudora*, 190 U. S., 169, and cas. cit.) As said by Mr. Justice Field in *Hadden* v. *The Collector* (5 Wall., 107–110):

> These observations apply with special force to acts of Congress. Everyone who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title [citing instances].

It is quite common for the title of a statute to be narrower than the statute itself, and the reason often is (as in the present case) that the original bill, while in its progress through Congress, is

broadened by amendment without a corresponding amendment to the title.

Perhaps the most familiar instances in the Federal courts are in the subtitles or headings of the tariff acts, which are so often absurdly insufficient to cover the articles therein enumerated. Thus, sponges used to appear under the heading of "Chemicals, oils, or paints," and cork under "Flax, hemp, and jute." (21 Atty. Gen. Opin., 67; *Hollender* v. *Magone*, 149 U. S., 586, 591; *Seeberger* v. *Schlesinger*, 152 U. S., 581, 583.)

(*b*) *The reason of the law.* The statute being based upon an unlimited power of Congress, it is unnecessary to argue in its justification. The reason, however, was one for the proper consideration of Congress. True, the operation of the statute will occasionally, as in this case, exclude an article not objectionable in itself, because as a result of the practical difficulties of fixing thirteen standards every year, there must be an occasional failure to hit the mark precisely. This must be always the case with every general statute. Such things occur continually in the operation of the high protective tariff laws. A rate of duty intended to be prohibitive occasionally fails to keep out all of the particular article against which the prohibition is directed. A duty not intended to be prohibitive occasionally prohibits. These things are dependent on general price movements and other contingencies. They sometimes cause great

and unavoidable loss to a particular merchant. The duties operate to ruin his venture or to enable a competitor to undersell him. Fortunately no such unavoidable mischance is possible under the present law. Everybody knows, before the season for ordering teas, what teas can be ordered and what can not.

In adopting this legislation, according to the assumption of the circuit court of appeals in the case above cited, Congress intended to shut out all of the very low grades of tea in order to make sure of shutting out all adulterations. Congress considered it better to exclude everything rather than to get possibly a small supply of good stuff with certainly a much larger supply that was a worthless deception. This reasoning underlies many more things in the statutes- as, for instance, the anti-trust law, which makes all combinations in restraint of trade unlawful as the best means of preventing all combinations which would be deleterious to the public.

IV.

The delegation of details to the Secretary of the Treasury was proper, and indeed absolutely necessary.

There is nothing new about the establishment of physical standards. The Treasury Department at an early day had established standards of weight and measure. (5 Stat., 133.) Nor has the practice been confined to materials of such slight perishability as those just referred to. At least as

early as 1867 the Department, under statutory direction, commenced the system of preserving standard samples of wool and hair for the purpose of comparison, precisely as under the present act. (14 Stat., 560; Rev. Stat., sec. 2916.) As early as 1864 the statutes provided for the preservation of standards "by which the color and grades of sugar are to be regulated." (13 Stat., 202; Rev. Stat., sec. 2914.) The adoption of standards was "to insure certainty and uniformity," and the Secretary performed his duty "by procuring the standards from the proper parties at Amsterdam and furnishing them to the collector." (*Merritt* v. *Welsh*, 104 U. S., 694, 702–705.)

Congress can directly enact nothing that can not be formulated into words. A package of tea can not be put into a statute book. When Congress, as a result of long past experience, reached the conclusion that a package of tea must every year be selected for a standard, it necessarily reached the conclusion that the selection of the package must be left to some executive officer.

A denial of Congressional power to delegate this duty amounts to a partial denial of the right to regulate commerce with foreign nations—for, if Congress can not exercise a power in the only possible way, the power is practically nonexistent.

Some stress has been laid by the opponents of the law upon the argument that the powers given to the Secretary of the Treasury are subject to

abuse. It would be impossible to administer the Government if powers susceptible to abuse were withheld from executive officers. While this power is susceptible of abuse, the probability of abuse is particularly small. Tea is a commodity of almost universal consumption, especially among the poor. No Secretary will ever permit it to be set apart as a mere luxury for the rich.

It has often been laid down as an axiom of constitutional law that a Federal or State legislature can not delegate legislative power. The axiom, however, is one which very seldom invalidates a statute. The line between the province of the legislature and that of the executive is difficult to determine (*Wayman* v. *Southard*, 10 Wheat., 1, 46; *In re Oliver*, 17 Wis., 681), and, by application of the fundamental principle of constitutional law, the statute is to be given the benefit of any doubt. Carrying into effect in detail the legislative will is generally left to executive officers, although the details may be settled by the legislature if it desires to do so. There is thus a very broad field in which the legislative and executive functions are coordinate.

Recent decisions of this court recognize that to rigidly enforce the doctrine that Congress can not delegate legislative power would often in effect be a restriction upon legislative power, and they allow to Congress very wide latitude in this respect.

The leading authority is *Field* v. *Clark* (143

U. S., 649, 680–694). That case discussed the reciprocity clause of the McKinley tariff act of 1890, which authorized and directed the President to levy certain import duties upon the products of foreign countries whose tariffs "*he may deem to be* reciprocally unequal and unreasonable." Strong attack was made upon the law on the ground that there was no standard of inequality or unreasonableness fixed, so that the President was in effect given a legislative discretion. The objection was overruled, only two justices dissenting. Among the precedents cited in the report of the case is the act of 1874, permitting the President to suspend the consular courts of Turkey and Egypt whenever he shall "receive satisfactory information" that the governments of those countries have "organized other tribunals likely to secure to citizens of the United States in their dominions the same impartial justice which they now enjoy there," etc.

The McKinley reciprocity clause is very similar in construction to the present act. Congress indicated a desire to retaliate against all foreign tariffs which are "reciprocally unequal and unreasonable," but gave no indication as to what its standard of inequality and unreasonableness would be. On the contrary, it most expressly left the determination of this matter to the President and intrusted to him the sole responsibility of putting the law into effect, leaving his discretion entirely untrammeled. So in the present statute, Congress having indicated that it desires all tea imported in the

future to be substantially pure, good in quality, and fit for consumption, turns the matter over to the Secretary of the Treasury and the assistants whom he is authorized to call together, knowing them to be much better qualified than itself to fix standards for the carrying into effect of the legislative will.

In *Dunlap* v. *United States* (173 U. S., 65) the tariff act of 1894, as construed by this court, provided for a rebate of the alcohol tax to manufacturers in case the Secretary of the Treasury should find that such rebate was practicable, and make regulations accordingly. The Chief Justice said, in delivering the opinion of the court (p. 71): "But if the right of the manufacturer could not inure without regulations, and Congress had left it to the Secretary to determine whether any which he could prescribe and enforce would adequately protect the revenue and the manufacturers, and he had concluded to the contrary, or if he had found that it was not practicable to enforce such as he believed necessary without further legislation, then it is obvious the right to the rebate would not attach." The constitutionality of this legislation was strenuously attacked by the able counsel who appeared for the manufacturers, but the majority of the court held that Congress "may reasonably be held to have left it to the Secretary to determine whether or not such regulations could be framed, *and if so, whether further legislation would be required.* It is true that the right to the rebate was derived

from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations if he found it practicable to do so" (p. 74).

It has been held in lower courts that the discretion lodged in the Secretary of War as to allowing bridges over navigable rivers is an unconstitutional delegation of power, but the latest decisions are to the contrary. (*United States* v. *City of Moline*, 82 Fed. Rep., 592; *E. A. Chatfield Co.* v. *New Haven*, 110 Fed. Rep., 788.) The question has not been passed upon in this court. (*Montgomery* v. *Portland*, 190 U. S., 89, 106–107.) The Secretary of War has a general right to make rules for the regulation of navigation on navigable rivers, which have the force of law; and both he and the Secretary of the Navy have large legislative powers over their respective departments of the public defense. (*United States* v. *Ormsbee*, 74 Fed. Rep., 207, 209, and cas. cit.)

In *Dastervignes* v. *United States* (122 Fed. Rep., 30), the circuit court of appeals for the ninth circuit discusses the power of the Secretary of the Interior to make regulations concerning the forest reservations of the United States, under the sundry civil appropriation act of June 4, 1897 (30 Stat., 35). The powers exercised by him are sustained, and the plaintiff in error held to have been properly convicted for breach of one of his regulations.

Tremendous legislative powers were delegated to President Washington by some of our earliest

legislation. Thus by the act of June 4, 1794, chap. 41 (1 Stat., 372), he was, "*whenever in his opinion the public safety shall so require*, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same *whenever he shall think proper;*" the embargo to terminate in fifteen days from the next actual meeting of Congress. No standard was given him to which to refer. Similar wide powers were four times granted to Presidents Adams and Jefferson (1 Stat., 615; 2 Stat., 9–10, 352, 411). The tonnage act of March 3, 1815 (3 Stat., 224), repeals discriminating duties as to any foreign nation whenever the President "*shall be satisfied* that the discriminating or countervailing duties of such foreign nation, *so far as they operate to the disadvantage of the United States*, have been abolished." Here again no standard was given him. He was merely to exercise the act—legislative in essence—of deciding whether a certain condition of things was generally disadvantageous to the United States. More radical powers, with a discretion at least equally wide, were granted by the Canadian reciprocity act of March 3, 1887 (24 Stat., 475). Equally wide discretion is given by the food acts (Rev. Stat., sec. 2494; act of August 30, 1890; 26 Stat., 414). These and similar enactments are set forth in the opinion of the majority in *Field* v.

Clark (*supra*). We proceed to the enumeration of some which were not there mentioned.

The Guano Islands act of 1856 (11 Stat., 119) delegated to the discretion of the President, unhampered by any rules or limitations, the question whether newly discovered guano islands should "be considered as appertaining to the United States;" and this was held "a strictly executive power" (*Jones* v. *United States*, 137 U. S., 202, 209, 217). Yet by the exercise of the power he annexed new territory to the Union.

It would be impossible to govern new conquests efficiently without a wide delegation of what would ordinarily be considered legislative power. Thus in the Porto Rico act of April 12, 1900, chap. 191 (31 Stat., 78–79), the Secretary of the Treasury was given power to designate the ports of entry and to approve regulations of the Commissioner of Navigation such "as he may deem expedient for the nationalization of all vessels owned by the inhabitants of Porto Rico * * * and for the admission of the same to all the benefits of the coasting trade of the United States." The Philippine legislation contained in the army appropriation act of March, 1902, chap. 803 (31 Stat., 910), is very sweeping. All *civil* powers "necessary to govern the said islands" are to "be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct for the establishment of civil government," etc., full reports to be

made to Congress "of all legislative acts and proceedings of the temporary government instituted under the provisions hereof." Territorial governments have always been given great legislative powers by a delegation similar to that which is made by the States to their municipalities. (As to which see 1 Dillon on Municipal Corporations, § 308; *Paul* v. *Gloucester County*, 50 N. J. Law, 585, 600.) In this case, however, the Territorial legislature was not originally constituted by Congress. Congress delegated to the President the right to establish a legislature. The President established the Philippine Commission, and the extensive legislation of that Commission received thus its original warrant. It was indeed ratified by the Philippine act of July 1, 1902, chapter 1369; but the original act can not be considered unconstitutional except upon principles which would be most dangerous to the effective government of our distant dependencies (1 Columbia Law Review, 33, 35, 37), while the new act itself confers wide powers upon the President, as in relation to the regulation of commerce during periods of armed resistance to our authority (32 Stat., 692).

The number of instances to be found in our laws where a wide discretion is left to an executive officer is necessarily very great. (See, for instance, *In re Griner*, 16 Wis., 423, and precedents cited.) We may refer, for instance, to the provisions of the civil-service act requiring that standards of

fitness for office be established, but leaving it to the President to fix the standards. The constitutionality of such provisions has always been upheld. (Opinion of Justices, 138 Mass., 601.)

No complaint seems ever to have been made of the act of June 26, 1848, chapter 70, "to prevent the importation of adulterated and spurious drugs and medicines" (9 Stat., 237; Rev. Stats., sec. 2933 *et seq.*), because it delegates power to determine the standards of "quality, purity, and fitness for medical purposes." That act was the prototype of the act now under discussion. The standards are not even fixed by an executive officer of this Government, but by "the United States, Edinburgh, London, French, and German pharmacopœias and dispensatories." (Sec. 2935.) The Treasury Regulations are similar to those under the tea act. Thus among the articles admitted are "aloes when affording 80 per cent of pure aloetic extractive." Under "opium" is a provision that "the percentage of morphia contained in imported crude opium must be ascertained by what is known as Dr. Squibb's method of analysis." Under "rhubarb" is the following: "None admissible but the article known as East Indian, Turkey, or Russian rhubarb." (Customs Regulations, 1892, pp. 370–372.) Delegation to a State board of health of the power of "regulating minimum standards of food and drugs" was sustained in *Isenhour* v. *State* (157 Ind., 517, 521–522).

By the agricultural appropriation act of March 3, 1903, chapter 1008 (32 Stat., 1147, 1158), an appropriation is made, among other things, "to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists and such other experts as he may deem necessary, to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various States and of the courts of justice." We are informed that a movement is in progress among the States to adopt by statute whatever standards the Secretary shall establish.

A recent example of the delegation of power to fix a standard for use in regulating foreign commerce is to be found in the provision for the free admission to this country of animals of "recognized breeds," the recognizing power being the Secretary of Agriculture. (Tariff of 1897, par. 473.)

By the Alaska act of July 27, 1868, chapter 273 (15 Stat., 240, 241, 246; Rev. Stat., secs. 1955, 1956), the importation and use of firearms was made subject to the discretion of the President, while the power to make game laws as to fur-bearing animals was delegated to the Secretary of the Treasury.

The Secretary of the Treasury is also made the sole judge of the expediency of increasing the subsidiary copper coinage. (Act of February 12, 1873, c. 131, sec. 30; 17 Stat., 429; Rev. Stat., sec. 3529.)

Congress can authorize the Secretary of the Treasury or Secretary of the Interior to require, in their discretion, oaths the violation of which is ground for prosecution for perjury. (*United States* v. *Bailey*, 9 Pet., 238; *Caha* v. *United States*, 152 U. S., 211, 219.)

In establishing a bankruptcy system it can delegate to each State the determination from time to time of the exemptions which are to be recognized by the Federal courts within its limits in the interest of local uniformity of practice. (*Hanover Bank* v. *Moyses*, 186 U. S., 181, 189–190.)

These are but instances selected from an immense variety to be found in the Federal statute books to the same effect.

Similar instances may be found everywhere among the statute books of the various States and decisions thereunder.

Thus we may refer to the discretion given to the courts as to the admission of attorneys, which is not confined to the case of attorneys who are to exercise the privilege of appearing in court. So the establishment of a standard of fitness for admission to medical practice may be fixed by a State medical society or university. (*Hewitt* v. *Charier* 16 Pick., 353.)

In *State* v. *Heinemann* (80 Wis., 253, 257, 258) a number of statutes are referred to, which have received the approval of the courts, which grant to State boards the right to examine and license candidates for entrance into certain occupations, such

as medicine, dentistry, pharmacy, plumbing, and locomotive engineering. The standards of quality are fixed by these boards.

In *Dent* v. *West Virginia* (129 U. S., 114, 122) Mr. Justice Field refers to the common legislative practice "to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal." In the case cited one of the qualifications for the practice of medicine was a diploma from "a reputable medical college in the school of medicine to which the person desiring to practice belongs." The State legislature thus delegated the fixing of standards to nonofficial bodies whom it considered more competent in that particular than itself. The subject is again considered by this court in *Reetz* v. *Michigan* (188 U. S., 505); and to the same effect see *Overshiner* v. *State* (156 Ind., 187, 193); *Scholle* v. *State* (90 Md., 729).

In *Martin* v. *Witherspoon* (125 Mass., 175) it was held proper to authorize the governor and council "to prescribe under what circumstances outgoing vessels shall be compelled to take pilots."

Municipal officers may be authorized "on grounds of expediency amounting almost to necessity" to

make regulations, the violation of which shall be subject to criminal prosecution by the State's attorney. (*Brodbine* v. *Revere*, 182 Mass., 598.)

In re Flaherty (105 Cal., 558), quoted by this court with approval in *Wilson* v. *Eureka City* (173 U. S., 32, 36–37), an ordinance giving a single municipal officer absolute discretion to permit or forbid the beating of drums on the street was sustained; and the courts cite a large number of similar decisions. This court in the latter case cites also an ordinance allowing the mayor of Boston to decide whether anyone shall be allowed to address the public in public grounds.

This license system, so common in our municipalities, is a yet more advanced instance of the delegation of discretion to the executive officers; for they are not required to establish standards at all, but may limit the number of licenses to be issued and select the licensees according to their own discretion. At a time when all foreign commerce was interdicted by embargo and the coasting trade was put under heavy restrictions, a licensing power was given to the President, to be exercised according to his discretion. (Embargo acts of 1808–9, 2 Stat., 500, 506.)

Of similar character, as pointed out by Judge Cooley, was the power given to the President during the civil war to suspend the writ of *habeas corpus*. (Cooley's Constitutional Law, 2d ed., pp. 100–101.)

The decisions of certain State courts (there are no such decisions of this court) holding statutes to be void as involving a delegation of legislative power are based upon a rigid theory as to the division of power between the three coordinate branches of the Government, which theory has been found so impracticable that it has been very much relaxed by the general weight of authority. Many interesting instances might be quoted where these spheres have been held to overlap.

Thus the pardoning power is granted by the Constitution to the President; but the remission of penalties, which is a branch of the pardoning power, was assumed from the time of the First Congress to be within legislative jurisdiction (6 Stat., 3), and was then delegated by Congress to the Secretary of the Treasury. (*The Laura*, 114 U. S., 411, and statutes cited.)

The recent case of *United States* v. *Duell* (172 U. S., 576) sustains a direct appeal from the Commissioner of Patents to the court of appeals for the District of Columbia, thus affording a most striking illustration of the principle that the same act may be both executive and judicial in character; and other instances to the same effect are collected in the article on "Federal Judges and Quasi Judges," in 6 Yale L. J.

Rules of court sometimes revolutionize the settled methods of procedure in litigation. Such rules are legislative in character, the right to legislate in this manner being delegated to the courts.

We have thus far argued this question of delegation of power as if there be really a broad constitutional principle, such as is claimed by the appellants, debarring the legislature from delegating any portion of its legislative discretion to an executive officer, even though the legislature be of the opinion that the object which it desires to attain would be better effectuated by such delegation. It may be considered bold for us to contest this doctrine after it has been so often laid down. The doctrine never has, however, been made the basis in this court of a decision invalidating any particular statute. Every recognition which it has received here has been *obiter*.

It must, of course, be conceded that the legislature can not delegate distinctively legislative functions to the executive or to the judiciary without the consent of the latter. No department can be made to do the duties of another department except by its own consent.

It may be safe to concede also that a statute can be conceived of—although perhaps none has ever been actually enacted—which would be uncontestably void as a delegation of legislative power. Thus if we assume that at the end of the second year of a Presidential term one of the political parties is in possession of the three branches of the legislature (President, Senate, and House), and that the Senate and the House are about to pass into the control of the opposite party by less than a two-thirds majority, it may be conceived

that a law might be enacted delegating the entire legislative power to the President for the remainder of his term; and such a statute may be conceded to be unconstitutional.

But we have already shown the doctrine to be full of exceptions, and we believe that the analogy of these exceptions, properly applied, would sustain every statute *which evinces upon its face a legislative belief that some executive officer is better fitted than Congress to prescribe the course of action necessary to effectuate some particular result which Congress desires*—that no such statute can fail of operation unless at least the officer upon whom the burden is cast declines to bear it.

V.

Due process of law was not denied to the plaintiff.

He complains that he did not have a hearing. It does not appear that he asked for a hearing. The regulations did not deny him a hearing. So far as appears, he might have been heard both before the Board of Tea Experts and the Secretary of the Treasury upon the establishment of the standard in 1901, and before the General Appraisers upon the reexamination of his teas in 1902. If it is really the fact, as he claims, that he had three or four thousand packages of pure tea of lower quality than the standard of 1901 at the time when that standard was under consideration, it was his own fault that he did not supply the Board of Tea Experts with a sufficient quantity for use.

His complaint seems to be that the statute and regulations did not have any express provision on the subject of a notice and hearing. His counsel states (although not upon any testimony in the record) that the Board of Appraisers refused to permit the importer to be present at the examination of his teas or to furnish him with knowledge as to what persons were called as experts. In the absence of any evidence upon this point and in the absence of any objection by the plaintiff at the time of the examination, the point can not be raised here. In fact, however, the point would have been untenable if it had been raised and the necessary evidence to support it produced, except that possibly if he had asked for notice and a hearing the Board of Appraisers might have been obliged to listen to what he had to say (as to which it is not necessary to argue in the case at bar); but he was not entitled to see the experts or know who they are. This has long been settled in the analogous case of *customs reappraisals*.

It is a necessary practice in the administration of customs laws, on account of the difficulty of obtaining proper expert assistance if the parties are known to each other, since fear of subsequent ill feeling between merchants deters the experts from giving their assistance. It has been found wise in many such cases to adopt the practice of keeping the name of the importer unknown by the

experts, and the names of the experts unknown by him.

This particular question was fully argued and decided in *Origet* v. *Hedden* (155 U. S., 228, 236–8). In that case (a reappraisement under the old law) plaintiff's attorney asked leave to be present at the hearing, cross-examine the witnesses, or suggest questions to the appraisers, hear and know the testimony, etc., and also that plaintiff should be present. The appraisers denied the application, while expressing a desire to hear what the plaintiff might have to say and receive any suggestions he might make as to asking questions. The refusal was due to the Treasury instructions of June 9, 1885, which were in the interest of secrecy. The court held, following *Auffmordt* v. *Hedden* (137 U. S., 310, 312–18, 323–4), that the instructions were reasonable and proper. In that case as here, plaintiff relied upon *Stuart* v. *Palmer* and *Palmer* v. *McMahon*. This court fully sustained the Government's position, saying: "Duties imposed under tariff laws are paid in order that goods may be brought into the country, and provisions in respect to their levy and collection are framed in view of the character of the transaction."

In the Auffmordt case (137 U. S., p. 329) the court had said that "the Government has the right to prescribe the conditions attending the importation of goods upon which it will permit the

collector to be sued." A notable proof of this is to be found in the act of 1839, which took away altogether the right to sue a collector to recover moneys paid under protest, and left the importer without remedy. (*Cary* v. *Curtis*, 3 How., 236.)

The distinction is well settled between the taking of a man's property by right of the power of taxation, and the refusal of permission to bring foreign goods into the country except upon certain conditions to be imposed.

(*b*) Assuming the act otherwise to be constitutional, the provision for destroying teas not exported within six months after their rejection is constitutional also. It is necessary to dispose of the teas somehow. The importer is given ample time to remove them. His refusal to do so within six months may properly be regarded as an abandonment of the goods. Even if it were regarded as a penalty, this also is fully sustained by the cases in this court which approved the exaction of the 20 per cent so-called "additional duty" imposed by section 2900 of the Revised Statutes for the offense of overvaluation. This "additional duty" was levied as a matter of course if the reappraisement, after proceedings such as in the Origet case, resulted in a finding that the goods were worth 10 per cent above the value declared by the importer in his entry. This finding was final, and the importer's only remedy

was by a humble appeal to the dispensing power of the Secretary of the Treasury. (*Passavant* v. *United States*, 148 U. S., 214; *Origet* v. *Hedden*, *supra*, at p. 236.) It was not disputed by the Government that this "additional duty" was a penalty in the strictest sense of the word. It had been so held as far back as 1843 (4 Op., 182) and had been reaffirmed by the then Attorney-General (20 Op., 660), and that fact was conceded upon the argument of the Origet case.

It is, of course, clear that a person who imports nonimportable goods may properly be put to the expense of taking them away again. In this respect the case is precisely similar to that of the return of an alien immigrant at the expense of the transportation company that has brought him into our ports. (Act of September 13, 1888, chap. 1015; act of March 3, 1891, chap. 551.) Yet under these statutes the inspectors are not required to take any testimony at all, while their decision is absolutely final. (*Nishimura Ekiu* v. *United States*, 142 U. S., 651, 663; *Lem Moon Sing* v. *United States*, 158 U. S., 538; *Chin Bak Kan* v. *United States*, 186 U. S., 192.)

VI.

Plaintiff was not damnified by the act of 1897 or by the standard of 1901.

We have already shown that he is not entitled to legal relief. He is not even entitled to sympathy. In March, 1901, he received notice that he could

not import country green teas during the coming season unless they were at least as good as the Hyson of a fine Teenkai. Ample time was allowed him to notify his buyers in China and to supply them with samples of the Government standard. As his own witness says (pp. 25–26):

> I think the buying season in China for green tea begins in the latter part of June. I am not conversant with the dates, and it runs usually until the market is exhausted of stock. These standards are announced for the season about the month of March, so that they can be sent out to China before the opening of the season; and the intention is that anybody who needs or desires to buy tea can obtain the Government standard in time to send to China so that the buyers will know what tea will be brought into the United States next season. The new standards, I believe, are adopted in February, the following winter, before the next season begins.

Either his loss is due to his own failure to notify his buyers in China; or it is due to their default, for which he is responsible as against others and they are responsible to him; or it is due to a plan of his own to import teas below the standard, procure a judgment establishing the unconstitutionality of the act, and thus undersell his competitors. If advised that the act is unconstitutional, this was a proper enough speculation on

his part, but he can not complain when the speculation proves unsuccessful.

For the foregoing reasons it is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Special Assistant to the Attorney-General.

HENRY M. HOYT,
Solicitor-General.

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JAN 5 1904

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

WILLIAM J. BUTTERFIELD, PLAINTIFF IN ERROR,
v.
GEORGE R. BIDWELL. } No. 296.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

WILLIAM J. BUTTFIELD, PLAINTIFF IN error,
v.
GEORGE R. BIDWELL. } No. 296.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

This is one of the actions instituted to test the constitutionality of the Tea Inspection Act of 1897. Defendant was collector of the port of New York. Except as to the form of action, the case presented is quite similar to that in *Buttfield* v. *Stranahan*, No. 294 of this term. The action was tried before Judge Coxe, sitting with a jury, on October 22, 1902. A verdict was directed for the defendant, and (as the case involved a constitutional question) a writ of error was taken directly to this court.

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STATEMENT OF FACTS.

The complaint alleges that the collector did "unlawfully prevent the plaintiff from importing into the United States 226 packages of country green teas;" that the teas were found inferior in quality to the standards prescribed by law; that the collector "thereupon refused to permit the plaintiff to withdraw the said teas from the control of the defendant for consumption in this country, and prohibited and prevented the plaintiff from taking any other action with regard to said teas except to export them from the United States;" that the plaintiff offered to pay the duties on the teas; that the teas were wholesome, etc., and "superior to any valid standard fixed and established pursuant to any valid statute," etc.; and that "by reason of the wrongful acts of the defendant, above set forth, plaintiff has been subjected to various expenses and has been compelled to export and sell the same under great loss" (pp. 3–5).

The other causes of action are similar.

The evidence as to the quality of the teas is substantially the same as in the Stranahan case. The difference between the cases is in the steps taken after the ruling of the Board of General Appraisers.

The board having found the teas below standard in each instance, defendant or his deputy thereupon sent plaintiff a polite letter upon a form shown at page 30 of the record. The entire letter is as follows:

SIR: In accordance with the provisions of section 8 of the act of March 2, 1897, I transmit herewith two copies of the findings of the Board of General Appraisers on the tea covered by your invoices Nos. 9677 and 9680, covered by entry No. 8016.

G. R. BIDWELL, *Collector*.

Sending this letter seems to be the overt offense of the defendant.

It is not claimed that any attempt was made to force him into the position of converting the teas to his own use or committing a trespass upon them. They were in a bonded warehouse (p. 31). Plaintiff withdrew them and exported them from the country (p. 35):

> Q. On the receipt of these notices you wrote these two letters of protest, Exhibits 16 and 17, and either exported the goods out of the country or else sold them to somebody else to export out of the country?—A. That is correct.
>
> Q. Won't you explain the reasons why you did that; you mean that having read the law and the regulations, and taken advice on them, you concluded that was the only thing practical for you to do?—A. We knew from experience that was the only practicable thing to do.

The letters (Exhibits 16 and 17) to which plaintiff thus refers were on the same form, were directed to the defendant in his individual capacity,

and (after enumerating the invoices referred to) were as follows (pp. 32–34):

> We protest against your refusing to admit for consumption in this country the teas in question, on the ground that your action in so doing is illegal. We hereby notify you that we shall hold you personally liable for all damages that may be caused by said illegal acts on your part.

Plaintiff assumed without further inquiry that the law (although claimed by himself to be invalid) would have been respected by the collector. On the trial he relied on testimony of custom-house clerks that the "course of business at the custom-house" was to administer the law according to its terms and the Treasury Regulations thereunder (pp. 17, 19, 20).

The special question in this case is whether these facts are sufficient foundation for an action of tort against an officer of the Government.

ARGUMENT.

I. Plaintiff never had at any moment the right to possession of these teas except for the purpose of exporting them. He never paid or tendered the war duty, which was then in force. (Repealed by act of April 12, 1902, c. 500, § 10.) They were therefore detainable in bonded warehouse upon grounds altogether independent of the act of 1897.

II. The right of possession which he had he demanded and received. He exported the teas and sold them, and has the proceeds of their sale.

III. Assuming the act of 1897 to be unconstitutional, defendant did nothing to harm the plaintiff. It was certainly a proper civility to inclose him two copies of the Board of Appraisers' report.

Nor did he omit to do anything that he should have done for the plaintiff. He was never asked to release the teas, except for export.

"Mere omission or nonfeasance" is not a conversion (1 Chitty on Pleading, 174); and in the absence of any wrongful act or omission we respectfully submit that no action of tort—not even one of "trespass on the case," as plaintiff terms this one—is maintainable.

IV. Plaintiff's letters of protest are documents of no legal value. The collector could hardly have done anything with them except indorse them "File." They contained nothing for him to act upon, and were not even addressed to him in his official capacity.

V. The theory of this action seems to be that the act of 1897, while invalid, was being treated as valid by the Treasury Department, and therefore that if the duties had been tendered and the release of the teas for consumption requested defendant would have refused the tender and request.

In other words, because there were Treasury regulations outstanding which plaintiff claims to have been illegal, and because these regulations had been enforced against others, he claims that

he was excused from the necessity of making a demand for his own goods in order to put defendant into the position of a tortfeasor.

But A can not sue B in tort on the mere allegation that B has wronged C, D, and E, and by his thus established "course of business" would have wronged A if he had had the opportunity.

And if plaintiff is right in his main contention, the statute upon which the regulations were based was non-existent. An unconstitutional statute is void for all purposes (*Norton* v. *Shelby County*, 118 U. S., 425; *Huntington* v. *Worthen*, 120 U. S., 97). Hence the regulations were a nullity, and there is no presumption that defendant would have enforced them.

The forms of common law actions were changed by the code procedure, but the underlying principles survive. The Code has not given an action where no wrong was previously recognized as existent (Fiero on Law and Practice in Actions for Torts in the State of New York, 1903, p. 12). The requirement of demand and refusal is universally recognized (Cooley on Torts, 452; *Lewis* v. *Mott*, 36 N. Y., 395, 401–2; *Goodwin* v. *Wertheimer*, 99 N. Y., 149, 153).

We have been unable to find any authority excusing demand and refusal in case defendant has done no overt illegal act and plaintiff desires to bring an action of tort. One of the two cases cited by plaintiff is in ejectment and the other a proceeding in the Court of Claims.

VI. The other questions involved are discussed in our brief in No. 296 (*Buttfield* v. *Stranahan*).

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Special Assistant to the Attorney-General.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court of the United States.

No. 294.—October Term, 1903.

William J. Buttfield, Plaintiff in Error, vs. Nevada N. Stranahan, Collector of the Port of New York. | In error to the Circuit Court of the United States for the Southern District of New York.

[February 23, 1904.]

This case presents for determination the question of the constitutionality of a statute known as the tea inspection act, approved March 2, 1897. (29 Stat. 604.) The act is copied in full in the margin.*

*An Act To prevent the importation of impure and unwholesome tea.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section three of this act, and the importation of all such merchandise is hereby prohibited.

Sec. 2. That immediately after the passage of this act, and on or before February fifteenth of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the persons so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation, or any other cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to or from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged upon the duty herein provided, shall be paid out of the appropriation for "expenses of collecting the revenue from customs."

Sec. 3. That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom-houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

Sec. 4. That on making entry at the custom-house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall

On January 20, 1902, eight packages of tea were imported into the port of New York, per the steamer Adana, by a firm of which the plaintiff in error was the general partner. The tea was entered for import at the New York custom-house, and was stored in a bonded warehouse. At that time certain standards, enumerated in the margin,† which were selected by the board of tea inspectors, had been put in force by the Treasury regulations under said act of March 2, 1897.

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give bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true quality of each and every part of the invoice and accord with the specifications therein contained; or in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him with the standards established by this act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of tea to the collector or other revenue officer to whom is committed the collection of duties, and said officer shall draw or cause to be drawn samples of each line in every invoice and shall forward the same to a duly qualified examiner as provided in section seven: *Provided, however*, That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be) under the provisions of this act.

SEC. 5. That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality, and fitness for consumption to the standards hereinbefore provided, and no re-examination shall be demanded by the collector as provided in section six, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the custom authorities; but if on examination such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality, and fitness for con-

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† No. 1. Formosa Oolong.
No. 2. Foochon Oolong.
No. 3. North China Congon.
No. 4. South China Congon.
No. 5. India Tea (used for Ceylon tea.)
No. 6. Pingsuey, green tea.
No. 7. Country green tea.
No. 8. Japan tea, pan fried, (used for sun dried.)
No. 9. Japan tea, basket fried.
No. 10. Japan tea, dust or fannings.
No. 11. Capers (used for scented orange Pekoe.)
No. 12. Canton Oolong (*a*.)
No. 13. Scented Canton (*a*.)

The eight packages of tea in question were embraced in the class known as "Country green teas," numbered 7 on list of standards. The tea was examined on February 7, 1902, and was rejected as "inferior to standard in quality." By the term quality as thus used was meant the cup quality of the tea, that is to say, its taste and flavor. An appeal was taken by the importer to the board of general appraisers, and that board, on March 10, 1902, certified to the collector that "the said tea is inferior in quality

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sumption to the said standards the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom-house, unless on a re-examination called for by the importer or consignee the finding of the examiner shall be found to be erroneous: *Provided*, That should a portion of the invoice be passed by the examiner, a permit shall be granted for that portion and the remainder held for further examination, as provided in section six.

SEC. 6. That in case the collector, importer or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final re-examination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea or merchandise described as tea, out of the limits of the United States, within a period of six months after such final re-examination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

SEC. 7. That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry, and that for this purpose samples of the merchandise, obtained in the manner prescribed by section four of this act, shall be forwarded to the proper port by the collector or chief officer at that port of entry; that in all cases of examination or re-examination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

SEC. 8. That in cases of re-examination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples, and the papers therewith, to be distinguished by such mark

to the standard prescribed by law," and accordingly overruled the appeal. The firm was notified of the decision on March 12, 1902.

In November following the plaintiff in error—who had acquired the interest of his partner in the tea—applied to the collector for permission to withdraw the tea for consumption, on payment of the duties. The request was refused. Application was then made for the release of the tea from bond in order to export it. This was also refused on the ground that the tea had been finally rejected under the act of March 2, 1897, more than six months previous to the application. The plaintiff in error was also notified that the tea would be ordered to the public stores for destruction.

This action was commenced in the Supreme Court of the State of New York, county of New York, against the collector of the port of New York, to recover damages for the alleged wrongful seizure, removal and destruction of the tea in question. Averments were made of the importation, storing, tender of duties and refusal to accept the same, and of demand for the tea and refusal to deliver. A general denial was filed. The action being on account of acts done by the defendant under the revenue laws of the United States, as collector of customs, it was removed on his application to the Circuit Court of the United States for the Southern District of New York.

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that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

SEC. 9. That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition.

SEC. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations.

SEC. 11. That teas actually on shipboard for shipment to the United States at the time of the passage of this act shall not be subject to the prohibition hereof, but the provisions of the act entitled "An act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto.

SEC. 12. That the act entitled "An act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this act goes into effect.

Approved, March 2, 1897.

At the trial of the case before Circuit Judge Coxe and a jury, the exhibit reproduced in the margin was introduced in evidence.*

As indicated on this exhibit, the Country green teas thereon designated were arranged in their order of quality, from the highest to the lowest, No. 1 being the highest grade, and No. 17 the lowest. The designation in each perpendicular column represented the teas grown in a particular

*EXHIBIT No. 8.

Schedule of Country Green Teas arranged in Order of Quality.

1 Choicest Moyune	Choicest Teenkai					
2 Choice Moyune	Choice Teenkai					
3 Finest Moyune	Finest Teenkai					
4 Fine to Finest Moyune	Fine to Finest Teenkai					
5 Fine Moyune						
6 On Fine Moyune	Fine Teenkai					
7 Fully Good Medium Moyune	On Fine Teenkai					
8 Good Medium Moyune	Fully Good Medium Teenkai	Finest Fychow				
9 On Good Medium Moyune	Good Medium Teenkai	Fine "				
10 Fair Moyune	On Good Teenkai	Good Medium Fychow		Finest Wenchow		
11 Good Common Moyune	Fair Teenkai	Fair "		Fine "		
12 Common Moyune	Good Common Moyune	Good Common "		Good Med. "		Good, clean, genuine Shanghai packed
13	Common Teenkai	Common		Fair "		
14				Good Common		
15				Common "		
16						Mixed, Shanghai packed
17						Common, refined and adulterated Shanghai packed

district, and all the teas enumerated on the same horizontal line were considered as being equal in grade.

The chairman of the Board of Tea Experts of the Treasury Department testified that the standard for Country green teas in force at the time the tea in question was imported was Hyson of a Fine Teenkai, or No. 6 on the list of standards, and that before fixing this standard "the board made diligent search for any Country green teas of lower grades—Hysons of lower grades—of pure teas on the New York market obtainable by the trade, and were unable to find any." The term Hyson, it may be observed, indicated that the tea was made out of the coarsest leaves. For the plaintiff it was testified that the quality of the tea in controversy corresponded in quality with the grade No. 7 on Exhibit 8; while the evidence for the government was to the effect that it would grade as Fair Fychow, No. 11 on Exhibit 8. The testimony also tended to show that the tea in question differed only in respect to the cup quality from the government standard; the evidence for the government being that it was "a tea of a decidedly low grade, . . . a pure tea, but of low quality."

At the close of the evidence the court overruled a motion to direct a verdict for the plaintiff, and an exception was reserved. Thereupon the court, granting a motion on behalf of the defendant, instructed that the only question was as to the constitutionality of the statute under which the defendant, as collector of the port acted, and directed a verdict in his favor. Upon the judgment entered on the verdict, which was returned in accordance with this instruction, the case was brought directly to this court.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the Court.

The assignments of error assail the act of the trial court in denying the motion for the direction of a verdict in favor of plaintiff and in giving a peremptory instruction in favor of the defendant. Summarized, the contentions are as follows: 1st, that the act of March 2, 1897, confers authority to establish standards, and that such power is legislative and cannot constitutionally be delegated by Congress to administrative officers; 2d, that the plaintiff in error had a vested right to engage as a trader in foreign commerce and as such to import teas into the United States, which as a matter of fact were pure, wholesome and free from adulteration, fraud and deception, and which were fit for consumption; 3d, that the establishment and enforcement of standards of quality of teas, which operated to deprive the alleged vested right, constituted a deprivation of property without due process of law; 4th, that the act is unconstitutional, because it does not provide that notice and an opportunity to be

heard be afforded an importer before the rejection of his tea by the tea examiner, or the Tea Board of General Appraisers; and, 5th, that in any event the authority conferred by the statute to destroy goods upon the expiration of the time limit for their removal for export and the destruction of such property, without a judicial proceeding, was condemnation of property without hearing and the taking thereof without due process of law.

Whether the contentions just stated are tenable are the questions for consideration.

In examining the statute in order to determine its constitutionality we must be guided by the well-settled rule that every intendment is in favor of its validity. It must be presumed to be constitutional, unless its repugnancy to the Constitution clearly appears. (*Nicol* v. *Ames*, 173 U. S. 509, 514–515; *Gettysburg Park Case*, 160 U. S. 668, 680.)

The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. (*Lottery Case*, 188 U. S. 321, 353–356; *Leisy* v. *Hardin*, 135 U. S. 100, 108.) Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted. (9 Stat. 237; Rev. Stat. sec. 2933 *et seq.*)

The power to regulate foreign commerce is certainly as efficacious as that to regulate commerce with the Indian tribes. And this last power was referred to in *United States* v. *43 Gallons of Whiskey*, (93 U. S. 194,) as exclusive and absolute, and was declared to be "as broad and as free from restrictions as that to regulate commerce with foreign nations." In that case it was held that it was competent for Congress to extend the prohibition against the unlicensed introduction and sale of spirituous liquors in the Indian country to territory in proximity to that occupied by the Indians, thus restricting commerce with them. We entertain no doubt that it was competent for Congress, by statute, under the power to regu-

late foreign commerce, to establish standards and provided that no right should exist to import teas from foreign countries into the United States, unless such teas should be equal to the standards.

As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution.

That the act of March 2, 1897, was not an exercise by Congress of purely arbitrary power is evident from the terms of the law, and a consideration of the circumstances which led to its enactment. The history of the act and its proper construction, as also the reasons for deciding that the regulations of the Secretary of the Treasury establishing the standard here in question were warranted by the statute, were succinctly stated in the opinion of the Court of Appeals for the Second Circuit in *Buttfield* v. *Bidwell*, (96 Fed. Rep. 328,) and we adopt such statement. The court said:

"The basic question in this case is as to the true construction of the act of Congress of March 2, 1897, entitled 'An act to prevent the importation of impure and unwholesome tea.' Section 1 makes it unlawful 'to import or bring into the United States any merchandise as tea which is inferior in purity, quality and fitness for consumption to the standards provided in section 3 of this act, and the importation of all such merchandise is hereby prohibited.' Section 2 provides for the appointment by the Secretary of the Treasury, immediately after the passage of the act, and on or before February 15 of each subsequent year, of the board of tea experts, 'who shall prepare and submit to him standard samples of tea.' Section 3 provides that the Secretary of the Treasury, upon the recommendation of said board, 'shall fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States,' samples of such standards to be deposited in various custom-houses, and supplied to importers and dealers at cost, and declares that all teas, or merchandise described as tea, of inferior purity, quality and fitness for consumption to such standards shall be deemed to be within the prohibition of the first section hereof. Sections 4–7 provide for the examination of importations of tea, for a re-examination by the board of general appraisers in case of a protest by the importer or collector against the finding of the primary examiner, and for testing the purity quality and fitness for consumption in all cases of examination or re-examination, 'according to the usages and customs of the tea trade, including the test of an infusion of the same in boiling water, and, if necessary, chemical analysis.' . . . The history of the enactment shows that the word 'quality' was industriously inserted to make the act a more stringent substitute for the existing legislation. By the act

of March 3, 1883, then in force, any merchandise imported 'for sale as tea,' adulterated with spurious or exhausted leaves, or containing such an admixture of deleterious substances as to make it 'unfit for use,' was prohibited; and exhausted leaves were defined to include any tea which had been deprived of its proper quality, strength or virtue by steeping, infusion, decoction or other means. Thus the importation of tea containing such an admixture of leaves as to be deprived of its proper quality or virtue by any method of treatment was prohibited. The act, however, contained no provision for the establishment of government standards; and the establishment of uniform standards in the interest of the importer and of the consumer had become a recognized necessity. In a report by the Senate Committee on Commerce, in 1897, the provision was suggested as designed, among other things, to protect the consumer against 'worthless rubbish,' and insure his 'receiving an article fit for use.' The report pointed out that the 'lowest average grade of tea ever before known was now being used' by our consumers, and proposed as a remedy the establishment of standards of the 'lowest grades of tea fit for use.' As originally introduced in the House, the bill prohibited the importation of 'any merchandise as tea which is inferior in purity or fitness for consumption to the standards provided in section 3 of this act.' It was amended in the Senate by inserting the word 'quality' between the words 'purity' and 'fitness for consumption' wherever they occurred in the House bill. The amendment evinces the intention of the Senate to authorize the adoption of uniform standards by the Secretary of the Treasury which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably or possibly so because of their inferior quality. The House concurred in the amendment, and the measure was enacted in its present terms. We conclude that the regulations of the Secretary of the Treasury are warranted by the provisions of the act."

The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of *Field* v. *Clark*, (143 U. S. 649,) where it was decided that the third section of the tariff act of October 1, 1890, was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea and hides. We may say of the legislation in this case, as was said of the legislation considered in *Field* v. *Clark*, that it does not, in any real sense, invest administrative officials

with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and established standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted, is a question we are not called upon to consider. The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment, to be honestly exercised, and if that were important there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting on him.

It is urged that there was denial of due process of law in failing to accord plaintiff in error a hearing before the Board of Tea Inspectors and the Secretary of the Treasury in establishing the standard in question, and before the general appraisers upon the re-examination of the tea. Waiving the point that the plaintiff in error does not appear to have asked for a hearing, and assuming that the statute did not confer such a right, we are of opinion that the statute was not objectionable for that reason. The provisions in respect to the fixing of standards and the examination of samples by government experts was for the purpose of determining whether the conditions existed which conferred the right to import, and they therefore in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of the agents of the government, upon whom power on the subject was conferred.

It remains only to consider the contention that the provision of the statute commanding the destruction of teas not exported within six months after their final rejection was unconstitutional. The importer was charged with notice of the provisions of the law, and the conditions upon which teas might be brought from abroad, with a view to their introduction into the United States for consumption. Failing to establish the right to import, because of the inferior quality of the merchandise as compared with the standard, the duty was imposed upon the importer to perform certain requirements, and to take the goods from the custody of the authorities within a period of time fixed by the statute, which was ample in duration. He was notified of the happening of the various contingencies requiring positive action on his part. The duty to take such action was enjoined

upon him, and if he failed to exercise it the collector was under the obligation after the expiration of the time limit to destroy the goods. That plaintiff in error had knowledge of the various steps taken with respect to the tea, including the final rejection by the board of general appraisers, is conceded. We think the provision of the statute complained of was not wanting in due process of law.

Affirmed.

Mr. Justice BREWER and Mr. Justice BROWN, not having heard the argument, took no part in the decision of this case.

No. 296.

William J. Buttfield, Plaintiff in Error, *vs.* George R. Bidwell. } In error to the Circuit Court of the United States for the Southern District of New York.

[February 23, 1904.]

Mr. Justice WHITE delivered the opinion of the Court.

This action was brought by Buttfield to recover damages sustained by being prevented from importing into the United States a large number of packages of Country green teas, being four shipments from China. These teas, on re-examination by the board of general appraisers, were found to be inferior in quality to the standard prescribed by law; and Bidwell, as collector for the port of New York, so notified Buttfield. Thereupon the teas were withdrawn from the bonded warehouse and exported. Judgment was entered for Bidwell upon a directed verdict in his favor. The right to reversal of that judgment is predicated solely upon the asserted unconstitutionality of the tea inspection act of March 2, 1897. It will not be necessary to determine whether, even supposing the statute to be unconstitutional, a cause of action is stated in any of the four counts of the complaint below. The statute having been held to be valid in the opinion just announced in *Buttfield* v. *Stranahan*, the judgment must be and is hereby

Affirmed.

Mr. Justice BREWER and Mr. Justice BROWN took no part in the decision of this case.

No. 516.

William J. Buttfield, as Claimant of Seven Packages of Tea, Plaintiff in Error, *vs.* The United States. In error to the District Court of the United States for the Eastern District of New York.

[February 23, 1904.]

Mr. Justice WHITE delivered the opinion of the Court.

This was a proceeding for the condemation of seven packages of tea, which had been reimported after export from this country upon a final rejection of the tea by the board of general appraisers as not entitled to admission into the United States for consumption under the tea inspection act of March 2, 1897. Buttfield appeared as claimant, and a demurrer filed on his behalf to the information was overruled. The claimant failing to plead further, a final decree and judgment of forfeiture was entered. A reversal is asked upon the sole ground that the act of March 2, 1897, referred to, is repugnant to the Constitution of the United States. Upon the authority of *Buttfield* v. *Stranahan* just decided, the judgment below is

Affirmed.

Mr. Justice BREWER and Mr. Justice BROWN took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.